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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
EASTERN DISTRICT, AT NEW ORLEANS,
COMMENCING, FEBRUARY, 1843.

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**PRESENT:**

**HON. FRANÇOIS XAVIER MARTIN.**  
**HON. HENRY A. BULLARD.**  
**HON. ALONZO MORPHY.**  
**HON. EDWARD SIMON.**  
**HON. RICE GARLAND.**

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WILLIAM MAYO v. WILLIAM B. SAVORY.

Under the 7th section of the act of 20th March, 1839, amending article 375, of the Code of Practice, a demand in reconvention may be instituted for any cause, though not necessarily connected with or incidental to the main action, where the plaintiff resides out of the state, or in a different parish from the defendant.

Under the 17th section of the act of 20th March, 1839, commissions to take testimony may be taken out by either party, at any time after service of petition and citation; and it will be no objection to the admissibility of the evidence, that it relates to facts not then at issue, nor alleged in the petition.

APPEAL from the District Court of Iberville, *Deblieux, J.*

SIMON, J. This action is founded on an authentic sale of the steamboat *Trader*, three-fourths of which were sold by the plaintiff to the defendant for the sum of two thousand dollars. Six hundred dollars of the price having been paid, there appears to remain

due a balance of fourteen hundred dollars, with ten per cent interest from the date of the act, until paid. The plaintiff claims judgment for that balance, with the vendor's privilege on the boat.

The defendant pleads divers matters in avoidance of the plaintiff's action, such as error in fact in the contract sued upon; and, assuming the character of plaintiff, he avers that the petitioner is indebted to him in the sum of \$562,11, which is the one-half of certain advances, debts, and expenses which he was compelled to pay for the steamboat Alpha, heretofore owned in partnership between him and the plaintiff, which sum he opposes as a reconventional demand. He prays that the contract sued on may be annulled and set aside, and that he may have judgment against the plaintiff for the amount of the advances, debts, and expenses by him paid, resulting from the first partnership in relation to the Alpha.

This case was tried by a jury, who gave a verdict in favor of the plaintiff for \$1225, with five per cent interest, per annum, from the time when it became due, until paid. After an unsuccessful attempt on the part of the plaintiff, to obtain a new trial, on the ground that the jury had not allowed him the privilege prayed for; and another unsuccessful attempt, on the part of the defendant, to obtain a new trial, judgment was rendered by the court, confirming the verdict of the jury, and allowing the plaintiff his vendor's privilege; and after a second attempt on the part of the defendant, to obtain a new trial, on the ground that the court could not allow a privilege where the jury had found none, the defendant appealed.

The record comes up in a very imperfect state, and from the certificate of the clerk that it does not contain the testimony adduced on the trial, we are precluded from examining the merits of the case, and from enquiring into the correctness of the verdict; but the appellant has called our attention to several bills of exceptions which are found in the record, and which we shall, therefore, proceed to examine.

The first is one taken to the opinion of the court *a qua*, sustaining the exceptions of the plaintiff to the reconventional demand set up in the defendant's original answer, as regards the

transactions of the steamboat Alpha. These exceptions are so closely connected with another bill of exceptions taken by the plaintiff to the opinion of the judge, permitting the defendant to file an amended and supplemental answer to the plaintiff's demand, in which he sets up another reconventional claim resulting from the transactions in relation to the steamboat Trader, that it is proper we should examine them together.

By the 7th section of an act of the Legislature of the 20th of March, 1839, (Bullard & Curry's Digest, p. 156,) it is enacted, that "article 375, of the Code of Practice be so amended, that when the plaintiff resides out of the state, or in the state, but in a different parish from the defendant, said defendant may institute a demand in reconvention against him *for any cause*, although such demand be not necessarily connected with, or incidental to the main cause of action." This law appears to have provided for the very case under consideration, and, according to its terms, it is clear that the defendant was at liberty to set up all his reconventional demands resulting from the transactions relative to the partnership in the steamboat Alpha, as well as those resulting from the partnership in the steamboat Trader. The plaintiff resides in a different parish from the defendant, and the judge *a quo* erred in not overruling the plaintiff's exceptions to the reconventional claim set up in the defendant's original answer. He did not err, however, in permitting the defendant to file his supplemental answer.

The next bill of exceptions relates to the rejection of the testimony of divers witnesses taken by virtue of a commission. This testimony was objected to on the ground that, at the time it was taken, there was no issue in the case between the parties; and the judge adds, that he was of opinion that testimony taken on commission on facts not at issue between the parties at the time of taking it, or not alleged in the petition, if the case is not at issue, should not be admitted, as the party against whom such testimony is taken has a right to be put on his guard by sufficient averments before he can be called on to cross examine witnesses. This would be correct under article 359, of the Code of Practice; but by the 17th section of the statute of the 20th of March, 1839, (Bullard & Curry's Digest, 433,) it is enacted, that "com-

missions to take testimony may issue at any time after the service of petition and citation." This law is general in its terms, it applies as well to the plaintiff, as to the defendant; they are both at liberty to take out their commissions immediately after the service of the citation; and, although the former law might perhaps be considered as more properly and more justly suited to the fair exercise and enforcement of the legal rights of the parties, we are bound to obey the will of the law-maker, and to say that the inferior judge erred in rejecting the testimony offered by the defendant, and which had been taken by virtue of a commission issued before issue joined.

With regard to the error alleged to have been committed by the lower judge, in allowing the plaintiff the exercise of the vendor's privilege on the property sold, when the jury did not allow it in their verdict, we think proper to abstain from expressing any opinion. As we have already said, the state of the record precludes us from examining the merits of the case; and that would be enquiring into the correctness of the verdict of the jury, and of the judgment of the court rendered thereon. As the case is to be remanded for a new trial, the parties will have another opportunity of investigating this point before a new jury.

It is, therefore, ordered that the judgment of the District Court be annulled, and reversed, and that this case be remanded to the court below for a new trial; the appellee paying the costs of this appeal.

Robertson and Talbot, for the plaintiffs.

Labauve, for the appellant.

Succession of Falconer—Morgan, Appellant.

**SUCCESSION OF WILLIAM R. FALCONER—CHARLES MORGAN,
Appellant.**

The laws in force prior to the promulgation of the Civil Code of 1825, relative to the recording of mortgages in the country parishes, provided that all acts of mortgage should be recorded in the office of the judge of the parish where the mortgaged property was situated. They required no separate record of mortgages to be kept, but directed that all notarial acts, whether creating mortgages or not, should be recorded in numerical order, in the same book. Acts of 24th March, 1810, and 26th March, 1815. Hence, where an act was passed before a Parish Judge, in his notarial capacity, relative to property in his parish, no further inscription was necessary to give effect, against third persons, to the mortgage resulting from it. By the Code of 1825, the duties previously prescribed only to the Register of Mortgages in New Orleans, were extended to the Parish Judges throughout the State. C. C. 3349, 3350, 3351, 3353, 3356.

It is the registry, in the manner pointed out by law, which alone gives effect to a mortgage, as against third persons; as to them, it is valid, not as it has been executed between the parties, but as it has been recorded. It is incumbent on the creditor who claims a preference over others, to give notice of his claim, in the manner pointed out by law. If he fail to ascertain that his mortgage has been correctly registered, he must suffer for the error, saving his recourse against the recorder. Creditors are not bound to look beyond the register itself, or the certificate which the recording officers are bound to make out. C. C. 3357.

APPEAL from the Court of Pointe Coupée, *Cooley, J.*

Hisley, for the appellant.

L. Janin, contra.

MORPHY, J. A tableau of distribution having been filed by the administratrix of the estate of the late William R. Falconer, various oppositions were made to it. Among them was one, filed by several of the ordinary creditors of the deceased, to the claim of Charles Morgan, who was therein set down as a mortgage creditor for \$14,715. This opposition having been sustained by the court below, Charles Morgan has appealed.

The record shows that, on the 25th of April, 1838, the deceased executed to the appellant, before the Parish Judge of Pointe Coupée, a mortgage on a tract of land and a number of slaves, to secure the payment of \$14,715, with nine per cent interest per annum, and that on the same day this mortgage was recorded by the Parish Judge, under No. 728, in the book by him kept for the

registry of the legal and conventional mortgages of the parish ; but that, through inattention, no doubt, the recording was not made in conformity with the original act, the amount stated in the book of mortgages being only \$1415, instead of \$14,715. A statement of the present Parish Judge of Pointe Coupée, received as evidence on the trial, further shows, that for the registry of mortgages in his parish two books are kept ; one called the Book of Legal and Conventional Mortgages, and another in which the judicial mortgages are recorded ; and that when certificates of mortgages are given, these books are alone examined. The appellant claims the benefit of the mortgage for the amount mentioned in the notarial act, while the appellees contend that the mortgage is valid and binding on them only to the amount for which it has been euredistered.

It is urged, on the part of the appellant, that it is sufficient for the preservation of a mortgage in the country parishes of the State, if the act containing it is on file, or is recorded in the Parish Judge's office, whether it be transcribed into the Record of Mortgages or not ; that, at all events, the mortgage in question was recorded in the Book of Mortgages, and that the registry itself afforded the means to all persons inspecting it of discovering the error committed, inasmuch as it gave the date of the notarial act in which the mortgage had been stipulated. In support of the first position assumed, we have been referred to various decisions to be found in 3 Martin, N. S. 352. 6 Ib. N. S. 121. 2 La. 576. 7 La. 460. But all these decisions will be found, upon examination, to be based on provisions of law then in force, which pointed out no particular manner in which mortgages were to be recorded in the country. Far from requiring a separate record of mortgages to be kept, those laws only prescribed that the acts containing mortgages should be recorded in the office of the judge of the parish where the mortgaged property was situated, and that all notarial acts, whether creating mortgages or not, should be recorded in numerical order in one and the same book. Hence it was held, that when an act was passed before a Parish Judge in his notarial capacity, relating to property situated in his parish, no further transcription or inscription was necessary to give effect to the mortgage resulting from it against third persons.

Bullard & Curry's Digest, 595, 596. But the framers of the Louisiana Code, taking into view, no doubt, the growth of our population and the consequent increase of transactions, thought proper to place the country and the city on the same footing in relation to the registry of mortgages, and extended to the different Parish Judges of the State the duties which the Code of 1808 had prescribed only to the Register of Mortgages of New Orleans. Civ. Code, arts. 3349, 3350, 3351, 3353, 3356. These provisions require, distinctly, the keeping and recording of mortgages in certain books to be kept for that purpose; they describe the nature of the acts to be recorded in each book or register, and provide that the Recorder of Mortgages, and Parish Judges fulfilling the same duties, shall deliver to all persons who may demand them, certificates of the mortgages, privileges, or donations which they may have thus recorded. These several enactments are preceded by article 3297, which declares that, "among creditors the mortgage whether conventional, legal, or judicial, has force only from the time of recording it in the manner hereinafter directed, except in the cases mentioned below"; and by article 3314, which says, "conventional mortgage is acquired only by consent of the parties, and judicial and legal mortgages, only by the effect of a judgment or by operation of law. But these mortgages are only allowed to prejudice third persons, when they have been publicly inscribed on records kept for that purpose, and in the manner hereinafter directed." From the foregoing provisions of law it is clear, that it is the enregistering alone, in the manner pointed out by law, which gives effect to a mortgage against third persons. If this be true, it is equally clear that a mortgage can be binding on them only for the amount thus enregistered.

As to the argument, that the mortgage was recorded with a reference to the notarial act, by consulting which the error might have been discovered, it is a sufficient answer to say, that a conventional mortgage is by law valid as to third persons, not as it has been executed between the parties, but as it stands recorded, notice being of its essence as regards such third persons. It is incumbent on the creditor who claims a preference over other creditors, to give such notice in the manner prescribed by law. It is in his power to ascertain whether the registry of his mort-

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gage has been correctly made. If he fails to do this, he must suffer for the error committed by the recorder, saving his recourse against the latter ; but the other creditors are not bound to look beyond the register itself, or beyond the certificate of mortgages which the recording officers are bound to make out and deliver from such register. The law which makes it the duty of a notary who passes an act of sale, and of a sheriff who sells property under seizure, to procure a certificate of mortgages will be vain indeed, if the purchaser were bound, at his peril, to look beyond such certificate, lest the recorder might have committed some error. Such a construction would, at once, destroy the value and usefulness of our registry laws, by introducing into all transactions concerning immoveable property the utmost danger and insecurity. 4 Troplong, Priv. et Hypoth. p. 356, No. 1002. Civ. Code, art. 3357. 9 La. 354.

Judgment affirmed.

WILLIAM DICKSON 'LEA,' Administrator, v. JOHN FREDERICK MYERS and others.

The rule, *Quæ temporalia sunt ad agendum, sunt perpetua ad excipiendum*, applies only where a defendant is in the exercise of the right, or in possession of the property or position, attempted to be taken from him. It cannot protect a party who has remained silent, and suffered a purchaser to keep possession during the period required to prescribe an action of rescision.

Silence for seventeen years, after the age of majority, will be considered a tacit ratification of the acts of a minor. The longest period of prescription for such acts is ten years. C. C. 2218.

APPEAL from the District Court of Livingston, Jones, J.

J. L. Sheaf and A. Hennen, for the plaintiff.

Waterston, for the appellants.

SIMON, J. The plaintiff, as administrator of the estate of David Kemp deceased, sets up title to a tract of land containing twelve hundred and eighty acres, situated in the parish of Livingston, on the Notalbany river, opposite the town of Springfield.

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He alleges that the tract formerly belonged to John Frederick Myers deceased, and was inventoried as his property in 1814. That David Kemp derived his title thereto, by legal and just conveyances, from all the heirs of John Frederick Myers, and for a valuable consideration. That David Kemp, the deceased, possessed the said tract as owner from and after the 20th of May, 1817, to the time of his death in 1820. That said possession was openly continued by the heirs of David Kemp, and especially by one of them, up to the year 1840; whereby the said David Kemp and his heirs, under him, have acquired a just and legal title thereto by prescription.

He further represents that Frederick Myers, B. Childress and Thomas Green Davidson, and others, clandestinely took possession of the said tract during the year 1840, in bad faith, for the purpose of compelling the heirs of Kemp to become plaintiffs against them; and that they are now in possession of the said land, trespassing on the same, to the injury of the succession represented by the petitioner, to the amount of two thousand dollars.* Wherefore, he prays that the said Myers, Childress, and Davidson may be compelled to show under what title they claim the said tract of land, and by what authority they claim possession thereof; that they may be condemned to pay, *in solido*, the damages suffered, to the amount of four thousand dollars; that the tract of land in controversy may be declared to belong to the succession of David Kemp, and that his heirs may be adjudged to be the only legal owners thereof; &c.

Childress and Davidson joined issue, first, by denying the allegations contained in the plaintiff's petition, and alleging that the pretended rights of the petitioner originated in fraud, and are absolutely null and void. They further aver that they are the sole owners and possessors of the land in dispute, having acquired their title thereto by an unbroken chain from the legitimate forced heirs of John F. Myers deceased, who died possessed of the same; and that, in virtue of the said chain of title, they are now in the actual corporeal possession of the land, and have been so,

* He also claims \$2000 further, for damage for the slander of the title of Kemp.

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uninterruptedly, for upwards of five years. They pray to be quieted in their title and possession.

John F. Myers also filed an answer, in which he states that he has no interest in this suit or the land in controversy, having, on the 4th of December, 1837, sold his portion to Jacob J. Watts and B. Childress, for a valuable consideration.

Jacob J. Watts also appeared as one of the defendants, and disclaimed all title and interest in the land in dispute, averring that the title and interest which he once had, now belong to B. Childress, his former co-proprietor.

Under these pleadings, the respective titles of the parties were investigated; and judgment having been rendered below in favor of the plaintiff, in his capacity of administrator, the defendants, Childress and Davidson, took the present appeal.

The evidence shows that, on the 23d of May, 1817, Thomas Kennedy, acting as the agent and attorney in fact of Catharine Myers, the widow of John F. Myers deceased, and George Myers, one of the legitimate heirs of said deceased, executed a deed of sale, transfer and assignment to David Kemp, of *all the right, title, interest, claim and demand of what kind, nature, or quality soever, as well real as personal*, which they had in and to the estate of John F. Myers deceased, *by right of marriage, inheritance, or in any other manner whatsoever, &c.*, for and in consideration of the sum of two thousand and one hundred dollars, cash in hand paid. This deed was passed before the Parish Judge of the parish of St. Helena wherein the parties resided, and is accompanied by a power of attorney from Catharine Myers to Kennedy, in which he is authorized and empowered to act for her and in her name, and to contract for her in any way he thinks most advantageous, in collecting and recovering her dower due her by the estate of her late husband, obligating herself to comply with any contract or sale he might make in transferring her claim, &c.

On the 31st of May, 1817, Frederick Myers, who was then a minor, above the age of eighteen years, and who is stated in the act to have been duly emancipated and authorized by the Parish Judge, with the advice of a family meeting, sold and transferred *all his hereditary rights and claims* to David Kemp, for and in

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consideration of the sum of seven hundred dollars. This act was passed before the same Parish Judge, and is subscribed by Frederick Myers, and Thomas Kennedy as his curator *ad hoc*.

It appears that on the 4th of December, 1837, John F. Myers conveyed to B. Childress and Watts *all his rights as heir to his father, John F. Myers, and his mother, Catharine Myers*. That on the 28th of July, 1838, Charles Myers also conveyed to Watts, Childress, and one Facundus, *all his rights and claims to the estate of his father, John F. Myers*. This act was passed before Burlin Childress, (one of the vendees,) as Parish Judge of the parish of Livingston, and is only accepted by Facundus and Childress.

Several documents are also found in the record, showing certain proceedings had in the year 1814, in relation to the estate of John F. Myers deceased, and the inventory thereof, in which the land in controversy is included; also other proceedings had before the Court of Probates in 1835, and in 1840, and the sale made by the coroner, under an order of said court, of the tract of land in controversy, as belonging to the successions of John F. Myers and Catharine Myers, to Burlin Childress, dated the 1st of September, 1840; the will of John F. Myers, and the probate thereof, in which will, he acknowledges George Myers, Frederick Myers, and Charles Myers as his legitimate heirs, and appoints his second wife, Ann Eliza, executrix of said will; and the deed of sale from the sheriff to the defendant Davidson, to establish his title to one-half of the land in dispute, seized and sold on his co-defendant, Childress, who remained the owner of the other half.

The parol evidence establishes, that John F. Myers deceased repeatedly acknowledged Catharine Myers as his wife, and George Myers and Frederick Myers as his legitimate children. Catharine survived several years after his death, and in his will he declares himself the legitimate father of said George and Frederick, *his two children by his former wife*. It appears, also, from the evidence, that he was reputed as married to Ann Eliza, the mother of Charles Myers, and a witness, who was not present at the wedding, says that he heard them say that they were married about the year 1812. This marriage, if it ever existed, must

have taken place while Catharine was still living, and about two years before the will was made.

From the facts of the case, it does not appear to us that the defendants have acquired any title from Charles Myers to any part of the land in controversy. He was the only issue of an unlawful marriage, (if it ever existed,) between his father and Ann Eliza; and if the latter was only his concubine, this circumstance cannot in any way authorize him to set up any claim to his father's succession, either as one of his children or under the will. It has been clearly proved, by the acknowledgment of the deceased, that Catharine was *his former wife*, and that George and Frederick were *his legitimate children*; indeed, that is corroborated by the testimony of the witness, who states that *he understood from his father and mother that Catharine was married to Myers*; and if so, Catharine being still living, and having even survived her husband, it is clear that Charles Myers, the son of Ann Eliza, was begotten from an unlawful second marriage, or from an open adulterous concubinage. We agree with the judge *a quo* that Charles was incapable of inheriting from John F. Myers, either as legal or constituted heir; and that George and Frederick Myers were the sole legitimate heirs of the deceased, and succeeded to all his rights.

The question of heirship and legitimacy being thus disposed of, we have next to inquire into the rights of the widow, transferred to David Kemp by virtue of her power of attorney. It is doubtful whether the sale made by her agent would be sufficient to divest her of the property, as it might, perhaps, be successfully urged that the power was not sufficient, and that the agent went beyond the object of the authorization. But her power of attorney alludes only to her *right of dower*, which she wishes to recover from the estate of her husband, and she obligated herself to comply with any contract or *sale* that might be made in transferring her right of dower. This circumstance, coupled with the fact that the deceased declares in his will, produced by the defendants, that the land was granted to him by the Spanish government, shows that it was not community property, and that the widow had no right or claim to set up to any part of the land

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itself, but only a right of dower which was conveyed to David Kemp.

Under this view of the legal rights of those from whom the parties to this controversy have derived their titles to the tract of land in dispute, it results, that George and Frederick were the only persons capable and competent to dispose of the title of their father to the tract of land inventoried as his property, and that the said tract was legally owned and possessed by each of them for one-half.

It is clear that David Kemp, having acquired all the rights of George Myers, who was of lawful age, to the estate of his father, has thereby become the owner of George's portion in the tract of land by him inherited from his father. The act of sale or transfer is in due form, and nothing, in our opinion, has been shown that can in any way affect the title so transferred by George to David Kemp; and so far, we must say that the plaintiff has shown an indisputable right to one-half of the land sued for.

To the other half, however, both plaintiffs and defendants have exhibited a title from Frederick Myers. The one to the plaintiff's ancestor, dated the 31st of May, 1817, whilst Frederick was a minor above eighteen years of age; and the other to the defendants or their authors, dated the 4th of December, 1837, which makes a period of nearly twenty years between the two sales; or, at least seventeen years, between the time of Frederick's majority, and his last transfer of his hereditary rights.

It has been strenuously contended by the defendants' counsel, that Frederick Myers having, legally, no capacity to contract, the sale and transfer by him made to David Kemp, is absolutely null and void, and that such nullity can always be opposed by him, (Myers,) or by his assigns, (*ayans cause*), by way of exception, whenever effect is sought to be given to the act passed during minority; and that under the rule "*quæ temporalia sunt ad agendum, sunt perpetua ad excipiendum*," no prescription can be invoked to destroy the effect of the exception.

It is true that, in this case, all the proceedings relative to the appointment of the curator who assisted the minor, and to the authorization by the judge, said to have been granted with the advice of a family meeting, are so irregular, that they can give no

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force to the act of the minor, and that his act would not be binding and obligatory, unless ratified by him, after having attained the age of majority. It is also true that, under the 1860th article of the Civil Code, contracts made by minors, without the intervention of the tutors or curators, or with such intervention, but unattended by the forms prescribed by law, being legally void, may be declared so, either in a *suit for nullity* or *on exception*, without any other proof than that of the minority of the party, and the want of formality in the act. The law was the same in 1817; see 10 Martin, 731, where it was held, that when minors sue for the property by them illegally alienated, it is not necessary they should show they have been injured by the contract. But here no action of rescision was ever brought by Frederick Myers, during the time prescribed by our law; nor did he ever sue for, or do any act on the subject of the property by him sold, which, from the substance of the evidence, is shown to have been taken possession of by the vendee, and subsequently by his heirs, who continued to possess it, by themselves and by others, for more than ten years before they were disturbed by the defendants. It is contended, however, that the absolute nullity of the plaintiff's title results from its very face, and that it is opposed *by way of exception*. This question is not new in our jurisprudence; and it is difficult, if not impossible, to distinguish this case from that of *Delahoussaye v. Dumartrait*, reported in the 16th volume of the Louisiana Reports, page 92, in which this court held, that "the rule, relied on by the defendants' counsel, derived from the Roman jurisprudence, is now well understood to exist only in favor of a defendant in the possession or exercise of the property, right or position attempted to be taken from him." It cannot, in our opinion, protect a party who has remained silent, and suffered a purchaser to remain in possession a length of time sufficient for the prescription of the action of rescision; and as Toullier says, (vol. 7, No. 602,) "*Si l'exception est perpétuelle, c'est quand le contrat n'a pas été exécuté.*" Were it otherwise, the law would be easily avoided, as under the protection of the rule relied on, it would often be convenient to a party, however old he might be, to disturb another in the peaceable enjoyment or possession of his property, to compel him to bring a suit, and

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then to defeat his title by the exception of minority. The law of prescription would become a dead letter, and a man sixty years old would be enabled, by this indirect exercise of an action of nullity, to recover property alienated by him during his minority.

We must, therefore, conclude, that the rule above quoted is not applicable to the defendants' position; that they cannot be protected under it; and we agree with the judge *a quo* that a silence of seventeen years, after the age of majority, may be fairly considered as a tacit ratification of the acts of a minor. Under the provisions of our laws, the longest prescription for such acts is ten years, (Civ. Code, art. 2218;) and there are cases in which four and five years are sufficient. Ib. arts. 1870, 3507.

With this view of the questions presented to our consideration, we do not hesitate to say that the plaintiff has shown the best title to the land in controversy; that the title to him transferred by Frederick, however defective originally, has become perfect by the lapse of time; that said Frederick could not transfer to the defendants greater rights than he himself had; and that the inferior judge did not err in sustaining the title set up by the plaintiff, as administrator of the estate of David Kemp.

Judgment affirmed.

ABSALOM KEES v. PIERRE LEFEBVRE.

One who excepts to the opinion of an inferior court, must place on the record whatever may be necessary to enable the Supreme Court to come to a decision:

APPEAL from the District Court of Lafourche Interior, Nicholls, J.

Beatty and Thibodeaux, for the plaintiff.

R. W. Nicholls, for the appellant.

GARLAND, J. This suit was brought to recover the amount of an account for work and labor as an undertaker, and for materials furnished by the plaintiff, for the construction of a large dwelling house on the plantation of the defendant. The latter in

his answer, alleges that at first, a plan of the building, and specifications as to the materials and cost, were drawn by the plaintiff and agreed to; but that subsequently, the building was by consent, much enlarged, and finished in a style very different from the first intention of the parties. The defendant alleged that the workmanship was very defective, and pleaded payments to a large amount, on account of the building. The case was tried by a jury who found a verdict for the plaintiff for \$4,857 46; and the defendant appealed.

While the case was pending below, the defendant made affidavit, that there existed a plan, and a specification of the materials to be used in the house, as first projected, and an estimate of the cost which were in the possession of the plaintiff, and had been agreed to by the parties. He called on the plaintiff to produce these papers, and demanded, in the event of their not being produced, that the affidavit made in relation to their contents should be taken as true. In obedience to the order of the court the plaintiff produced a paper which purported to be the original plan and specifications, and also stated the changes that had been made. To the reception of this paper the defendant objected, on the ground that it was not responsive to the call made, and that a portion of the contents made no part of the specifications, and was written after the partial completion of the house, and without the privity or assent of the defendant. The court overruled the objection, and the defendant excepted. The defendant relies on article 140 of the Code of Practice to sustain his objection. That article is explicit enough in itself, but its applicability to the present case is not obvious, nor has the defendant established it. The bill of exceptions seems to present a question of fact rather than of law. The defendant in his affidavit states the existence of a paper or papers which he says contain certain things. A paper is produced, and he then alleges that it contains more than he alleged or wanted, and that a portion must be rejected because something had been added to which he never assented. This raises an issue of fact, and the record does not enable us to decide it. The counsel for the defendant says that the face of the paper shows that it was written at different times, and subsequent to the partial construction of the building. This is very

true; but we find an admission in the record, that the plan was changed after the principal wall was raised. It may be that the addition to the original plan and specifications was made when the change in the plan was agreed to; but whether it was assented to or not, we have not the means of deciding. It has often been said by this court, that a party excepting must place on the record all that is necessary to enable it to come to a conclusion. This has not been done in the present case, and we cannot say that the court erred.

There is a mass of testimony in the record; and on several important points it is contradictory. A number of witnesses swear that the work was well executed and the materials good. Others say directly the contrary. Three workmen were appointed by the court, as experts, to examine the work and materials. They differed in opinion; the evidence of two being strongly with the plaintiff, and one saying that there ought to be a deduction from the amount charged. The weight of testimony appears to us not only from the report of the experts, but from the statement of other witnesses, to be in favor of the plaintiff. The jury found a verdict for him; and the Judge, who heard all the evidence, refused a new trial after a charge to the jury, to which no exception was taken.

The counsel for the defendant has insisted most strenuously, that the original estimate and specifications should be taken as a basis, and an allowance made in the same proportion for the additional work on the building. This we do not think just, as it is shown that the workmanship and finishing were in the first instance, to have been plain and substantial. Afterwards the plan was much enlarged; additional rooms, doors, windows, partitions, &c. were required, costly mantel pieces of marble were substituted for those of wood, a roof of slate was put on instead of shingles, and costly materials were used to finish the house in a manner appropriate to its increased dimensions, and to suit the taste and convenience of the owner. It would be unjust to fix as a criterion for the cost of a palace, the price of the plain, substantial materials and workmanship for an ordinary farm house, adding only for the increased quantity of labor and materials.

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The defendant has not complained of any credit being disallowed, of which he made any proof.

Judgment affirmed.

LOUIS J. BAGGETT v. ABRAHAM F. RIGHTOR and another.

Diligent enquiry for the maker of a note and for his domicile, without effect, will excuse the want of a formal demand of payment.

By endorsing a note, joint in their favor, the payees, each of whom can claim only a portion of its amount equal to that of the others, transfer only their respective interests in it; and, on the failure of the maker to pay, each will be liable to the holder to the extent of such interest only. C. C. 2079.

APPEAL from the District Court of Ascension, *Nicholls, J.*

M. Taylor, for the plaintiff.

Ilseley, for the appellants.

MORPHY, J. This is an appeal from a judgment rendered *in solido* against the defendants Rightor, and Rightor and Williams, endorsers of a promissory note, drawn by one Charles Bishop, to their order.*

Two points have been made in this court :

First. That no legal demand has been made on the drawer.

Second. That the endorsers, if liable, are not bound *in solido*.

I. The note sued on is dated at Donaldsonville, in the parish of Ascension, and mentions no particular place of payment. At maturity it was protested in that parish, where the maker had formerly owned property, where his wife was then residing, and where he himself had theretofore also resided. It is true that he appears to have had a residence, for some time, in the parish of

* The note was in these words :

Donaldsonville, 27th July, 1838.

\$4000 00.

In May, 1840, I promise to pay to H. T. Williams and A. F. Rightor, or order, four thousand dollars, for value received.

CHARLES BISHOP.

(Endorsed) A. F. RIGHTOR.

H. T. WILLIAMS.

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Pointe Coupée, where he owned property, and held the office of postmaster; but long prior to the date of the protest, he had left Pointe Coupée, after having sold his property there. Since then he has not been heard of, and has had no known residence in the State. The evidence shows, that shortly before the maturity of the note, the holder fruitlessly endeavored to ascertain his domicile, and that the notary, before protesting, made enquiries after him at several places of public resort, and called upon Mrs. Bishop who could not tell where he was living, she having obtained a divorce from him some time before. Diligent enquiry for the maker and his domicile, without effect, excuses the want of a formal demand. *Franklin v. Verbois et als.* 6 La. 727. Bayley on Bills, 198, 199. 9 Wheaton, 598.

II. On the second point, we think that the judge erred. The note sued on was the evidence of a joint obligation of the maker to the payees, who could each claim only one-half of its amount; by endorsing it they could transfer only their interest in it, and each can be made liable to the holder only to the extent of such interest, the maker having failed to pay. Thus the obligation, which was originally a joint one, retained that character, and the payees who were joint creditors with regard to the maker, became, under their endorsement and the default of the latter, joint debtors to the holder. Civil Code, art. 2079. 3 La. 438. It has been urged that the defendants, as endorsers, are in fact sureties for the maker, and that under the Civil Code of this State, article 3018, they are each bound for the whole debt. The obligation of an endorser is widely different from that of a surety, whatever may be the analogy between them in some respects. The latter is absolutely bound to pay in case the debtor does not, while the former is liable only under certain conditions, which are, that a legal demand shall be made on the maker, and that the endorser shall receive due notice of his failure to pay; but even were the defendants to be viewed in the light of sureties, each must be considered to have become the surety of the maker only to the amount of the sum which he transferred by his endorsement, and cannot be made answerable for more because their obligations were created by the same act. Civil Code, art. 2079.

It is, therefore, ordered that the judgment of the District Court

Babin v. Dodd, Tutor.

be so amended as to render the defendants liable jointly only, and not jointly and severally. The costs of this appeal to be borne by the plaintiff and appellee.

PAUL BABIN v. WILLIAM DODD, Tutor.

The ordinary tribunals have jurisdiction of suits against heirs, whether minors or of age, in all cases where an estate, after having been administered by a curator, testamentary executor, or tutor of a beneficiary heir, has come into their possession, or has been absolutely accepted; while the courts of probate have exclusive cognizance of all claims for money against successions under the management of curators, testamentary executors, or administrators. C. P. 924, 995, 996.

Claims against minors, interdicted or absent persons, whose estates are administered by curators, may be recovered before the ordinary tribunals. It is no objection to the exercise of such jurisdiction, that courts of probate have alone the means and right of fixing the amount which a tutor may allow for the expenditures of his ward. Proof of the means and revenue of the latter may be adduced before either tribunal; nor would any judgment of an ordinary court, allowing the claim, interfere with the powers of the court of probate, when auditing the tutor's accounts, to reject such portion of the sum paid under the judgment as might be found to exceed the revenue of the ward; as the tutor would be liable for any illegal acts or contracts made by him, on which such judgment was rendered.

APPEAL from the District Court of Iberville, *Deblieux, J.*

MORPHY, J. This suit is brought to recover \$408, a balance claimed for the boarding, clothing, and tuition during four years, of Theodosia LeBlanc a minor, the pupil of the defendant; an exception to the jurisdiction of the District Court was sustained, and the plaintiff has appealed.

In most of the questions of jurisdiction heretofore presented between the Courts of ordinary jurisdiction and the Courts of Probate of this State, in relation to suits against minors for the recovery of money, the claims were due by the successions of their fathers or mothers. Under the provisions of the Code of Practice, which are not free from ambiguity on the subject, this court has held that the ordinary tribunals have jurisdiction of suits against heirs, whether minors or of age, in all cases where an estate, after having been administered by a curator, testamentary executor, or tutor of a beneficiary heir, has come into their

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possession, or has been absolutely accepted ; while the Courts of Probate have exclusive cognizance of all claims for money brought against successions under the management of curators, testamentary executors, and administrators. Code of Practice, 924, 995, 996. 6 Martin, N. S. 519. 4 La. 202. 5 La. 384. 10 La. 18. 11 La. 359.

In the present case, the debt claimed is one due, not by a succession, but by the minor herself. It is one incurred by the defendant as her tutor, for her personal benefit and advantage. We can see no good reason, nor are we acquainted with any provision of law, which would prevent the District Courts from taking cognizance of claims against minors, or against interdicted persons, or absentees, whose estates are administered by curators. If minors be suable as heirs, in the ordinary courts, under article 996 of the Code of Practice, for debts due by the successions, which they inherit, it would seem that they cannot except to such jurisdiction, when sued for debts due by themselves. In the absence of any expression of legislative will on the subject, we do not feel authorized, either to extend the limited jurisdiction of the Courts of Probate, or to restrict the general one vested in the ordinary tribunals. But it is objected that, as the amount which a tutor is allowed to devote to the expenditures of a minor is limited by law, the Court of Probates has alone the means and the right of fixing such amount, when the tutor, who is the administrator of his ward's estate, shall render to that court the account which is required of him by law ; and that any judgment rendered by the District Court, would infringe upon the powers of the Probate Court, and could not be binding upon it when called upon to audit the tutor's account. We cannot see much difficulty or weight in this objection. Proof of the means and revenue of the minor can be adduced in the one court as well as in the other. As to the effect it would have on the plaintiff's claim, if it turned out that it exceeded the revenue of the minor, it is unnecessary for us to pronounce, in deciding on the question of jurisdiction ; but it is clear, that if the tutor had expended for the support and education of his ward, a larger sum than that authorized by law, he might make himself personally liable, either to the creditor with whom he contracted, or to the minor whose funds he ad-

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ministered contrary to law. In the latter case, the judgment of the District Court allowing the plaintiff the full amount of his claim would not interfere with the power of the Court of Probates to reject such portion of the sum paid under it, as might be found to exceed the revenue of the minor, because the tutor would be liable for the illegal acts or contracts made by him, on which such judgment may have been rendered against his ward.

It is therefore ordered that the judgment of the District Court be reversed, and the plea to its jurisdiction overruled, and the case remanded for further proceedings; the costs of this appeal to be borne by the appellee.

G. B. Taylor, for the appellant.

Labauve, for the defendant.

JAMES ALLEN v. THOMAS L. TERRY.

The prescription of one year, established by article 3499 of the Civil Code as to "retailers of provisions and liquors," is applicable only where supplies have been furnished for family use, and not to articles sold to shopkeepers.

APPEAL from the District Court of St. Tammany, *Jones, J.*

MARTIN, J. The plaintiff claims the value of goods, wares, and merchandize, and the amount of cash advances according to an account annexed to the petition. The claim was resisted on the pleas of the general issue and prescription. The defendant had a verdict and judgment, and the plaintiff appealed, after an unsuccessful attempt to obtain a new trial. The testimony appears to us to preponderate in favor of the plaintiff, and we would not think ourselves authorized to disturb the verdict, if we did not presume it was given on the plea of prescription only. The prescription relied on was that of one year, (Civil Code, art. 3499,) in regard to "*retailers of provisions and liquors.*" We believe this article extends only to supplies made to families, and not to goods furnished to shopkeepers. The account is for several barrels of whisky, several barrels and hampers of potatoes, two barrels of onions, three barrels of apples, etc.; and it is in evidence

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that the goods were intended for a store kept by the defendant in Madisonville, and it appears that he had not a family.

It is, therefore, ordered, that the judgment be annulled, and that the plaintiff recover from the defendant the sum of five hundred and fifty-one dollars and three cents, with legal interest from judicial demand until paid, and the costs in both courts.

A. Hennen, for the plaintiff.

Penn, for the defendant.

MARIE ANNE LOUISE BONNEFOY and others v. VALERY LANDRY and another, Executors.

Article 337 of the Code of Practice, which provides that the defendant may refuse to have his case tried by the judge before whom he has been sued, on account of the relationship existing between the judge and the plaintiff, was intended for the benefit and protection of the defendant; and where the latter waives his right of recusation, the party in whose favor a bias was supposed to exist, will not be permitted to exercise it.

It will not be presumed that a member of the bar would commence any suit without authority; nor will the production of his powers be required, unless on a suggestion supported by affidavit, that he acted without authority. The affidavit should state facts or circumstances rendering it probable that the action was unauthorized. It will not be enough to swear to a mere impression or belief.

APPEAL from the Court of Probates of Ascension, *Duffel, J.*

Connely and M. Taylor, for the appellants.

Ilseley, for the defendants.

MORPHY, J. This is an action brought by the heirs and legatees of the late Antoine Peytavin, most of whom reside in France, to compel his testamentary executors to render an account of their administration, and to pay to the petitioners the amount of their respective legacies. The petition sets forth in substance, that the late Antoine Peytavin died in February, 1835, that in December of that year, a sale of the effects of the succession took place, the price of the moveables payable in March, 1836, and of the slaves in three equal instalments falling due on the 15th of January of the years 1837, 1838, and 1839; that in May, 1837, the executors rendered a provisional account, showing that the

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proceeds of the sale, together with the crop of that year and the credits due the estate, amounted to \$104,608 68, besides an unsold tract of land; that the debts of the succession, of every kind, amounted to \$69,512 16, leaving a clear balance in favor of the succession of \$35,196 52, all of which ought to have been on hand on the 15th of January, 1839; and that for the last five years, the defendants have neglected to render any further account of their administration, or to pay over the proceeds of the succession, although often requested so to do.

The defendants pleaded to the jurisdiction of the court on the ground that the Probate Judge of Ascension was the brother-in-law of Valery Landry one of the executors, and prayed that the trial of the case might be referred to the District Court to be held in that parish, to be tried at its regular session. This exception having been overruled, the executors pleaded in abatement to the action, on account of the want of authority in the attorney who instituted it. The inferior judge sustained this plea, and ruled the attorney to produce his authority; to which opinion of the court the latter excepted. On the trial the attorney having proved an authorization only from Mathilde Conway, one of the legatees residing in Louisiana, the suit was dismissed, the court being of opinion that the executors could not be compelled to render an account, and pay over the sum they might be found to owe, until all the legatees shall have joined in the action. The plaintiffs appealed.

The judge, in our opinion, correctly overruled the plea to his jurisdiction, set up by the defendants on the ground of his affinity to one of them. "Recusation," says article 337 of the Code of Practice, "is the refusal on the part of the defendant, to have his cause tried by the judge before whom he has been sued, on account of the ties of relationship, existing between such judge and the plaintiff, or for other just causes hereafter expressed." This law is founded on the presumption of a bias or partiality in the judge towards his relations; but if the adverse party, for whose benefit and protection it was enacted chooses to waive the right it gives him, the relative in whose favor such bias or partiality is supposed to exist, will not be permitted to recuse the judge. So, although a witness is declared by law to be incompetent on the

score of interest, he cannot be objected to when he testifies against his own interest. *Cessante ratione legis, cessat et ipsa lex.* The judge himself might perhaps have refused to sit; but as he did not do so, the objection when urged by the defendants might well be viewed as made only for the purpose of delay.

As to the plea in abatement, we are of opinion that the attorney should not have been ruled to exhibit his authority, on an affidavit such as that made by the defendants. We have said that we will not presume that any gentleman of the profession would commence a suit unless duly empowered to do so, and that we will not require him to produce the power under which he acts, unless on a suggestion supported by affidavit, that such power was wanting. 9 Mart. 88. 10 Ib. 638. The defendants in this case made oath that they are under the impression, and verily believe, that the attorney who brought the present suit acted through error, and without sufficient authority. One of them states that his impression and belief arise from an examination of the facts set forth in their plea in abatement; but he swears to none of those facts, which, even if taken as true, do not necessarily lead to the conclusion that this suit was brought without authority. Affidavits such as the one made by the defendants could be resorted to without danger on every occasion, and would create serious delay and inconvenience, especially when the parties are living at a distant place. The affidavit should, in our opinion, state facts or circumstances sufficient to render it probable that the action is unauthorized, and thus destroy the contrary presumption. In many cases it might be impossible to prove a verbal or written authorization without taking out a commission. If it were sufficient merely to swear to an impression or belief, the existence of which in the mind of the party could never be disproved, the presumption in favor of the authority of attorneys at law would be entirely done away with, as such an affidavit might be made by every party whose object was delay.

It is, therefore, ordered that the judgment of the Court of Probates be reversed, the plea in abatement overruled, and this case remanded for further proceedings; the costs of this appeal to be borne by the appellees.

Morton v. Reynolds.

ADELAIDE MORTON v. MARY L. REYNOLDS.

A judgment rendered in an action commenced against a party in possession, who disclaims title, and cites his lessor to defend the suit, where the latter does not appear, will form *res judicata* only as to the possession; the question of title will be still open.

The prescription of five years, established by sect. 4 of the act of 10 March, 1834, entitled "an act relative to advertisements," as to "all informalities connected with or growing out of any public sale by a parish judge, sheriff, auctioneer, or other public officer," applies only to such informalities as relate to the manner, time, and place of making the advertisements required by law for public sales, and not to all illegalities or nullities whatsoever.

APPEAL from the District Court of Iberville, *Deblieux, J.*
Edwards, for the plaintiff.

Labauve, for the appellant.

MORPHY, J. In 1837, the plaintiff instituted a petitory action against Gillies Thompson, and recovered from him one undivided fourth of a tract of land of four *arpens*, lying on the river Mississippi, in the parish of Iberville. The defendant in that suit claimed title to the land under a sale from the mother of the plaintiff, to whom it had been adjudicated at the probate sale of the succession of her deceased husband. It appears that Gillies Thompson's title to the land had been divested by a sheriff's sale, and transferred to Mary L. Thompson, long before the institution of the plaintiff's suit against him; but that he nevertheless appeared and defended the action, as the owner of the property. 14 La. 272.

The plaintiff now brings the present suit against Mary L. Thompson, to obtain a judicial partition of the said land, to which she asserts title for one undivided fourth. The defendant first pleaded the general issue, but afterwards amended her answer by claiming title to the whole land, under a regular chain of titles from the estate of Thomas B. Pipkin, the plaintiff's father; and, in support of her titles, she pleaded prescription against all defects and nullities which might be found to exist in them. Gillies Thompson intervened, setting up a variety of matters in opposition to the plaintiff's demand. As he failed to show any interest in himself, and claimed no right whatever to the property,

his intervention was properly disregarded by the inferior judge, who rendered a judgment in favor of the plaintiff. The defendant has appealed.

The record shows that on the trial both parties relied on the same evidence which had been adduced in the suit against Gillies Thompson; the defendant relying, in addition, on her plea of prescription against the nullities and informalities which are admitted to exist in the adjudication of the property from Pipkin's estate to his surviving widow. Of these nullities the principal are, that the property was sold, in 1821, much below its appraised value, that it was adjudicated to the tutrix of the plaintiff, and that there was no under-tutor present at the family meeting which advised the sale. The evidence shows that the plaintiff was yet a minor in 1839, when her suit against Gillies Thompson was tried. The defendant relies on the act, approved March 10th, 1834, establishing a prescription of five years against all informalities connected with or growing out of any public sale made by any Parish Judge, sheriff, auctioneer, or other public officer, &c., whether the parties claiming are minors, married women, or interdicted persons. The plaintiff's counsel has urged that the prescription invoked, if applicable, was interrupted by the suit brought against Gillies Thompson, in which it was shown that he was in possession, and that the sale to Pipkin's widow, under which the defendant claims, was annulled by the judgment in that suit. It is clear that the judgment alluded to is, as to this defendant, *res inter alios judicata*, and cannot affect her rights. It might, indeed, have been opposed to her, although not a party to the suit, had it been rendered against Gillies Thompson, while he was the owner of the property subsequently transferred to her, because, in such a case she could not be viewed as a third person. Pothier, Oblig. vol. 2, part 4, chap. iii. sect. 3, article 3. But Gillies Thompson had ceased to own the property long before the inception of the plaintiff's suit against him, and had become the tenant or lessee of the present defendant. Even had he disclaimed title, and cited the true owner to defend the suit, and the latter had not appeared, the judgment rendered would have been *res judicata* only as to the possession, and would have left the question of title untouched. Civil Code, art. 2674. *Kling v. Fish*, 4 Mart.

N. S. 391. *Bayoujon's Heirs v. Crisswell*, 5 Mart. N. S. 232. How then can it be contended that the judgment rendered against Thompson should be binding on the defendant, or interrupt the prescription, when it is not shown that she ever had any notice whatever of that suit, Gillies Thompson having taken upon himself to defend it, in his own name, as owner of the land?

The only question then is, whether the prescription relied on extends to and covers such absolute nullities as those which exist in the sale to Pipkin's widow, under which the defendant holds. The provision of law creating this prescription is the fourth section of an act entitled, "an act relative to advertisements." Upon an attentive perusal of the whole law, it is difficult to believe that the expressions "all informalities connected with or growing out of any public sale," &c., were ever intended to embrace all kinds of illegalities or nullities whatever. They must, we think, be understood as applying to the omission of such formalities as relate to the manner, time, and place of making the advertisements required by law for all public sales. The counsel for the defendant has contended, that this prescription extends to all the causes of nullity, and to all the illegalities which are within the provisions of the monition law, passed and approved on the same day. The terms of the two laws are widely different, and show that they were not intended to apply to the same objects. The monition law expressly mentions "*all defects whatsoever and every informality* in the order, decree, or judgment of the court under which the sale was made, or any irregularity or illegality in the appraisements and advertisements, in time and manner of sale." Instead of these broad and comprehensive terms, the law relied on speaks only of *informalities*, and that in connection with provisions of law relating exclusively to the advertisements required for all public sales. An informality implies, to be sure, an illegality, because all formalities are prescribed by law; but a sale of a minor's property may be illegal and null, although clothed with all the formalities required by law. This may happen, as in the present case, where the property is sold below its appraised value, or where it is adjudicated to a tutor, or any other person who cannot legally purchase. Such nullities have nothing to do with the formalities required by law for the public sale of the property.

Plummer v. Schlatre.

They result from the violation of a prohibitory law. Civil Code of 1808, p. 4, art. 12; p. 68, art. 51; p. 70, art. 59.

Judgment affirmed.

JOSEPH R. PLUMMER v. JOSEPH SCHLATRE.

Article 43 of the Code of Practice which provides if the farmer or lessee of real estate be sued in any action, involving the title to real property, or any immovable right to such property, "that he shall declare to the plaintiff the name and residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and must defend it in the place of the tenant, who shall be discharged," applies only where the lessor or owner of the property sued for resides in the State, or, being absent, is represented therein; if the lessor reside out of the State, and is not represented therein, the lessee must defend the suit in his absence.

APPEAL from the District Court of Iberville, *Deblieux, J.*

Labauve, for the plaintiff. No counsel appeared for the appellant.

SIMON, J. The plaintiff alleges that he is the legal owner of a female slave, and her issue; that the slave was stolen from him, about four years ago, and brought into the State of Louisiana; and that she is in the illegal possession and detention of the defendant. He prays that a writ of sequestration may be issued; that the slave and her issue may be decreed to be his lawful property; and that the defendant be condemned to pay him the sum of five hundred dollars, as damages for the illegal detention, labor, and use of said slave.

A judgment by default having been regularly taken against the defendant, was set aside by the filing of the defendant's answer, in which he states that he became the legal and peaceable possessor of the negro girl sued for, but that he is not, and never was, the owner thereof; that George W. Wilkinson, of the State of Arkansas, is the true and lawful owner of the slave; and that he, the respondent, holds her as the property of Wilkinson, and has her in trust for him. He further avers that Wilkinson is an absentee, and is bound to defend the respondent in the peaceable possession of the property; and that it is necessary that an attor-

ney should be appointed to represent him in the defence of this suit. He prays for leave to call Wilkinson in warranty, that an attorney be appointed to represent him, and should a judgment be rendered against the defendant for any damages or costs, that the same judgment be rendered in his favor against Wilkinson, &c.

The plaintiff excepted to Wilkinson's being called in warranty, and moved that the defendant's prayer to that effect be rejected, on the ground that the defendant does not show himself entitled to such call in warranty by legal and proper evidence; and that a call in warranty cannot be made after a judgment by default. These exceptions having been sustained by the court *a qua*, the cause was immediately tried on its merits, and, judgment having been rendered in favor of the plaintiff for the slave sued for and the costs of the suit, the defendant, after having vainly attempted to obtain a new trial, took the present appeal.

The only question which this case presents, results from the plaintiff's exception to the defendant's attempt to call in warranty the person whom he declares to be the owner of the slave sued for. He does not show, in his answer, how, nor under what precarious title the slave was put in his possession, nor does he inform the court whether he holds the slave as the lessee, or as the agent of the owner; but simply states that he holds her in trust for him. This is, undoubtedly, insufficient; and were we ready to say that the lessee of a slave comes under the provisions of article 2674 of the Civil Code, and article 43 of the Code of Practice, (a question which appears to us very doubtful, and on which we abstain from expressing any opinion,) and is entitled to be dismissed from the suit, if he wishes it, by naming the person under whose right he possesses; the looseness of the defendant's allegations, unsupported by his oath, or by any other evidence, would, in our opinion, deprive him of the right of calling the owner in warranty.

It seems to us, also, that the provisions of article 43 of the Code of Practice, only apply to cases in which the lessor or owner of the property sued for, resides in the State, or, being absent, is represented therein. Here, the defendant only shows that the owner resides out of the State, and does not indicate the name of

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the person, if any exist, by whom he may be represented. We understand the terms of the law to mean that, if the lessor reside in the State or be represented therein, he shall be made a party to the suit; which implies that, if such lessor reside out of the State, and be not represented therein, the lessee shall take upon himself to defend the suit in the absence of the owner of the property. We think that the plaintiff's exceptions were properly sustained.

On the merits, the judgment appealed from appears to us to be correct, as the evidence adduced by the plaintiff fully sustains his claim to the property sued for by him. The identity of the slave is admitted in the defendant's answer.

Judgment affirmed.

JOSHUA MARKS v. NARCISSE LANDRY.

In an action for the price of certain timber, defendant having alleged that he purchased it from a third person who had it in possession, plaintiff offered the evidence of a witness, taken under a commission, who deposed, that, being entrusted with the timber by plaintiff, he had, without authority, delivered it to the person from whom defendant obtained it. The admission of the evidence was opposed on the ground that the witness, who was the agent of the plaintiff, had a direct interest in the result, as he would be responsible to the latter, in the event of his losing the suit, in consequence of having exceeded his authority. *Held*, that the evidence was admissible.

APPEAL from the District Court of Ascension, *Deblieux, J.*

Nicholls, for the appellant.

M. Taylor, for the defendant.

MARTIN, J. The plaintiff claims from the defendant two rafts of timber, or their value. The defendant resists the claim, alleging that he purchased the rafts from one Worden, who was in possession of them; that if the plaintiff be the owner, he must be bound by the acts of Worden, who was his agent, and cannot recover the rafts without reimbursing him (the defendant) what he paid for them. There was a verdict and judgment for the defendant, and the plaintiff has appealed. The case has been placed before us on a bill of exceptions taken by the plaintiff, on the re-

fusal of the court to permit him to read to the jury the testimony of Daniel Adams, which had been taken under a commission. The reading of the testimony was opposed by the defendant, on the ground that the witness was the agent of the plaintiff, and had an interest in the case, as appeared from his confession, in answer to one of the cross-interrogatories, that being entrusted with the rafts by the plaintiff, he had delivered them to Worden, (from whom the defendant had received them,) although he was not authorized so to do, but did so on his own responsibility. The counsel for the defendant and appellee urges that the court did not err; that, in the *first* place, one interested, directly or indirectly, in the result of a suit is not a competent witness. Civil Code, art. 2260. *Secondly*, that the witness offered was responsible for Worden, to whom he states that he entrusted the rafts sold by him. Civil Code, arts. 2976, 2977. *Thirdly*, that there is a distinction between the case of *Nicholson, Tutor, v. Patton*, (13 La. 213,) and the present; that in the former Finney *purloined* the note; that it was not placed in his hands, as his substitute, by Christy, and Christy was not responsible for his act.

The counsel for the plaintiff and appellant has referred us to the case of *Nicholson, Tutor, v. Patton*, 13 La. 213; and to Benjamin & Slidell's Digest, *Verbo* Evidence, Letter A. No. 46.

It appears to us that the court erred. The present case is less strong than that cited by the appellant, as Christy, by his testimony, which assisted the plaintiff in obtaining judgment, relieved himself from the heavy responsibility under which he was to his employer; while Adams, if his principal fails to recover in the present case, will remain liable to the action of those who may have sustained any injury from his misconduct. As the introduction of this testimony might have had great weight with the jury, and as the plaintiff has an undoubted right to have his case submitted to them on the legal testimony which he has procured, and the defendant that of having it weighed by the jury, the case must be remanded.

It is, therefore, ordered, that the judgment be annulled and reversed, the verdict set aside, and the case remanded for a new trial, with directions to the judge to allow the testimony of

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Adams to be read to the jury ; the defendant and appellee paying the costs of the appeal.

ZEPHIRIN MELANÇON v. SILVERE MELANÇON.

The endorsee of a promissory note, transferred before maturity, will not be affected by any want of consideration between the maker and the payee, of which he was not aware at the time of the transfer.

APPEAL from the District Court of Assumption, *Deblieux, J.*

This was an action by the endorsee, against the maker of a promissory note, for four hundred dollars, payable in "all the month of March, 1840." Admitting his signature to the note, the defendant denied generally the other allegations in the petition. He averred that the note had been made in favor of one Jean Baptiste Robichaux, as part of the price of a flat-boat ; that the sale of the boat was fraudulent, false representations having been made by the vendor, Robichaux, as to the condition of the boat ; that a few days after the boat was delivered to him, he gave notice through the newspapers, and by advertisements posted at public places in the town of Donaldsonville, of the fraudulent nature of the sale, and of his intention not to pay the notes. He alleged that the note sued on was transferred to the plaintiff, to enable Robichaux to defeat the defence growing out of the fraudulent character of the sale. The defendant interrogated the plaintiff whether, he was aware, at the time the note was transferred to him, that it had been given in part payment of the price of a certain flat-boat, that the sale of the boat was fraudulent and the note without consideration, and that he had given public notice thereof, and of his intention not to pay it.

On the trial Richard, a witness, stated that he was present when the note was endorsed by the payee to the plaintiff ; that it was transferred by Robichaux, about two years previously, and before its maturity, in part payment of a note of Robichaux, for \$471, held by the plaintiff, which had been given for a flat-boat pur-

chased by Robichaux from one Babin, who had purchased from the plaintiff. François Michel deposed, that having heard that plaintiff was about to purchase the note, he called on him, immediately after the publication of the notice, by defendant, of his intention not to pay the note, to advise plaintiff of the fact, when the latter showed him the note, which he had already in his possession.

The signatures on the note were admitted; and that it had been executed under a contract, pronounced fraudulent by the Supreme Court. (17 La. 98.) In answer to the interrogatories, the plaintiff stated that he knew, when he received the note, that it had been given in part payment for the flat boat, as alleged in the defendant's answer; but that he did not then know that it had been fraudulently obtained by Robichaux, nor that the defendant had given public notice that it was without consideration and would not be paid.

Ilseley and Nicholls, for the plaintiff.

M. Taylor, for the appellant.

MARTIN, J. The plaintiff sues as endorsee of the defendant's note. This claim was resisted on the ground that the note was given without consideration, in virtue of a contract, by which, to the knowledge of the plaintiff, the defendant was defrauded by the payee, the plaintiff's endorser, and that the plaintiff took the note, for the purpose of enabling his endorser to avoid and defeat the just and equitable defence of the respondent. There is an admission that the note was one of those which the plaintiff's endorser was directed to restore to the present defendant by the judgment in the case of *Melançon v. Robichaux*, 17 La. 97. The plaintiff had a verdict and judgment, and the defendant appealed, after an unsuccessful attempt to obtain a new trial. The evidence, in our opinion, supports the verdict; but the appellant's counsel has contended that he was entitled to a verdict, the plaintiff not having proved that he gave any other consideration for the transfer of the note, than a note or notes of his endorser which he surrendered without showing that the note or notes so given up were really and *bona fide* due; as otherwise, the endorsee of a note, fraudulently endorsed by the payee to prevent an inquiry into the consideration, could always succeed, since the

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mere writing of a note, and the delivery of it by the payee to the endorsee, to be delivered back before witnesses, would put the manufacture of the necessary testimony in their power. It does not appear to us that there is any force in this argument. The delivery of a sum of money by the payee to the endorsee, to be returned in the presence of witnesses as a discount of the note, would afford a like facility.

Judgment affirmed.

GABRIEL WINTER v. JAMES W. ZACHARIE.

Where a sheriff executes a deed to the purchaser of property sold at a judicial sale, stating therein that he had received the price, he will be responsible for any balance coming to the debtor, though he may not have received any part thereof; but if the debtor, with a full knowledge of the facts, enters into an agreement with the purchaser, by which the property is re-conveyed to him on conditions stipulated between themselves, it will be too late for him to complain.

APPEAL by the plaintiff from a judgment of the District Court of Ascension, *Deblieux, J.*, dissolving an injunction obtained by him.

M. Taylor, for the appellant.

Nicholls, for the defendant.

GARLAND, J. The defendant obtained an order of seizure and sale against a plantation and slaves, which the plaintiff had mortgaged to him to secure the payment of a note for \$2600, due January 1st, 1842, with interest for some years previous.

The plaintiff obtained an injunction, without having given security, on an allegation of error in giving the note, and an apprehension that he would be dispossessed of his property by virtue of a sheriff's sale made a few days previously, at the suit of J. W. Zacharie, at which the defendant became the purchaser.

This sale, the plaintiff avers, was null, as the defendant never paid the price at which the property was bid off, although the sheriff passed an act of sale and stated therein that the price was

paid. Wherefore, the plaintiff avers that the note is null, having been obtained by fraud and violence, without consideration, and in error as to the law and facts.

The defendant filed, in reply to these allegations, a plea of *res judicata*; and further alleged, that there was no ground for the opposition or injunction. He asked for a summary trial, and for damages on the dissolution of the injunction.

The facts are, that the defendant, in the spring of 1839, issued process on a mortgage and judgment he had obtained against the plaintiff, under which his plantation and slaves were seized and sold by the sheriff, and purchased by the defendant for two-thirds of the appraisement. One or more mortgages, besides that of the defendant, existed on the property, the amount of which he retained in his hands. After deducting their amount, and that of his own claim, a balance of upwards of \$11,000 belonged to the plaintiff, who avers he demanded it of the sheriff, and, as it was not paid, warned him not to make a deed to the defendant. A day or two after the sale, the sheriff made a deed to the defendant, in which, the part of the price coming to the plaintiff is stated to have been received in cash. On the day that the note, now in controversy, was executed, the plaintiff and defendant agreed that the sale made by the sheriff should be annulled: the latter re-conveyed to the plaintiff the plantation and slaves, reinstated his mortgage executed in 1834 and the judgment on it; and finally agreed to give a longer time for the payment of the money claimed, for and in consideration of which, the note for \$2600, with interest, was executed.

There is no plea of usury in this case; and we are unable to find in the evidence any appearance of violence in obtaining the note; nor are the allegations of fraud or error sustained. If the allegation of the sheriff in his deed be true, that he had received the price, then the defendant was the owner of the plantation and slaves, and could make whatever disposition of them he pleased; if not true, and the plaintiff states that he knew at the time it was not, then he acted with a full knowledge of the facts of the case, and not in error as he alleges. The sheriff, by making the deed to the defendant, gave a title to the property, as we said in the case in 17 La. 76, which is intimately connected with this;

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and if the plaintiff thought proper to obtain a retrocession of it by giving his note for \$2600, with interest, we think it is now too late for him to complain. If he had chosen to abide by the sale, the sheriff was bound to him for the \$11,600, although Zacharie may not have paid a cent of it.

Judgment affirmed.

DORCINO LANDRY, Administrator, v. PHARAON LEBLANC.

Article 1265 of the Civil Code, which provides that "any co-heir of age, at the sale of the hereditary effects, can become a purchaser to the amount of the portion owing to him from the succession, and is not obliged to pay the surplus of the purchase money over the portion coming to him, until this portion has been definitively fixed by a partition," does not apply to the case of a husband who resists the payment of a note executed by him, in the hands of the administrator of the succession of the payee, on the ground that his wife is an heir of the deceased.

APPEAL from the District Court of Ascension, *Nicholls, J.*

M. Taylor, for the plaintiff.

Duffel, for the appellant.

MARTIN, J. The defendant is appellant from a judgment, on a note which he had given to Françoise Landry, rendered in favor of the plaintiff, the administrator of her estate. The claim was resisted on the grounds, that Coralie Landry, the defendant's wife, is an heir of the person whose estate the plaintiff administers, for one twenty-first part thereof; that the estate is not at all indebted; that the plaintiff has had the administration of it for a long time, and has neglected to bring it to a close; that the estate being administered for the sole benefit of the heirs, the plaintiff ought not to harass him with a suit, as he (defendant) has the right and is desirous of having the note compensated by the portion of his wife in the estate; and that, as her husband, he has a right to provoke a partition, and to receive what is coming to her. The defendant's counsel has urged, that by the Civil Code, art. 1265, a co-heir, on purchasing any property of the estate, has a right to retain the price until his share be definitively fixed. The counsel for the plaintiff contends that this article of the Code is

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an exception to the general rule which requires that all the assets of an estate shall be brought together before a partition ; and he urges that the defendant has not brought himself within that exception. If the position of the appellant be correct, he might, under the authority given him by the Code of Practice, article 107, place his wife in a situation, in which she would have no legal mortgage on his property, and the estate would run the risk of losing a portion or the whole of its claim against him. The District Court did not err. That part of the Civil Code, invoked by the defendant, has no application to his case.'

Judgment affirmed.

THE COMMERCIAL BANK OF NEW ORLEANS v. ABRAHAM F. RIGHTOR and another.

APPEAL from the District Court of Ascension, *Nicholls, J.*

MORPHY, J. This action is brought on a promissory note drawn by Charles Bishop, to the order of, and endorsed by, the defendants Rightor, and Rightor and Williams. Judgment having been rendered by the inferior court in favor of the plaintiff, the defendants appealed.

This case cannot be distinguished from that of Baggett against the same defendants lately determined by this court, (*ante*, p. 18.) It comes before us on the same points and evidence, and must, therefore, receive the same decision.

It is, therefore, ordered, that the judgment appealed from be so amended as to render the defendants liable jointly only, and not jointly and severally. The costs of this appeal to be borne by the plaintiff and appellee.

M. Taylor, for the plaintiffs.

Ilisley, for the appellants.

VICTOR DUPERRON v. JACOB C. VAN WICKLE, Sheriff, and others.

Since the act of 20th March, 1839, (sect 19,) amending the Code of Practice, no appeal will be dismissed on the ground that the transcript was not filed on the return day, where such transcript was filed before the motion to dismiss.

A sheriff must, at his peril, avoid seizing under execution property not belonging to the defendant. It is not enough that he should presume, even on strong grounds, that it belongs to the latter; he must know it.

One whose property is illegally seized under an execution against another person, is not bound, on being informed thereof, to give any notice to the sheriff. He may, at once, seek relief by suit; unless, to avoid costs, he choose to make an amicable demand. And where the property has been sold by the sheriff, he will be entitled to recover, not the price at which it was sold, but its real value at the time.

In an action by a third person, against the sheriff and the plaintiffs in execution, for the value of property belonging to such third person, illegally seized and sold, and the proceeds of which had been applied in satisfaction of the execution, it will be no defence on the part of such plaintiffs that they did not authorize the seizure. They are bound to indemnify those who have been injured by the party employed to make the amount of their execution. *Qui sentit commodum, debet sentire et onus.*

APPEAL from the District Court of Pointe Coupée, *Nicholls, J.*

MARTIN, J. The dismissal of this appeal is asked, on the ground that the transcript was not filed on the return day. The counsel for the appellant urges, that the application is too tardy, as it was not made until after the transcript had been actually filed; and he has referred us to the following authorities. 10 La. 502. Ib. 506. 15 La. 15. 17 La. 113. The appellee relies on 12 La. 535. 8 La. 206. 7 La. 176. 4 La. 67. 3 La. 251. 8 Mart. N. S. 184. In the case of *Desormes' Heirs v. Desormes, Syndic*, 17 La. 115, we held that the cases in which the appeals were dismissed, although the transcript was filed before the dismissal was asked, "were decided previous to the act of the Legislature of March 20th, 1839, amending the Code of Practice, the 19th section of which cures the defects alleged, and if it does not, compels us to give the parties time to remove the objections. The appeal is, therefore, retained."

The defendants, the sheriff of the parish, and the plaintiffs in two writs of *fi. fa.*, are sued on the ground that the writs were executed on a quantity of cotton, which was not the property of

either of the defendants, but that of the present plaintiff. The defendants pleaded the general issue, and averred their inability to have known or discovered that the cotton seized was the property of the plaintiff. The co-defendants of the sheriff further pleaded that they never authorized him to seize any property of the plaintiff in execution of their judgment. There was a verdict and judgment for the plaintiff for \$352, and all the defendants appealed, after an unsuccessful attempt to obtain a new trial. Our attention is drawn to a bill of exceptions, taken by the defendants' counsel, to the refusal of the judge to charge the jury, "that, if a legal presumption authorized the sheriff to believe that the cotton seized belonged to either of the defendants, and he did not know that it belonged to Duperron, and if Duperron was informed of the seizure of the cotton, and might have given and neglected to give notice of his claims to the sheriff, either verbally or by judicial proceedings, they should find for the defendants, although they should be of opinion that the cotton belonged to Duperron." Instead of this, the court instructed the jury that, "the plaintiff had two remedies, either to oppose the seizure and sa'e agreeably to the fifth section of the second chapter of the Code of Practice, or by instituting suit; that if he failed to have recourse to this opposition, he was not precluded thereby from instituting suit; and that if the jury were of opinion that the cotton belonged to him, they should give him a verdict, notwithstanding his having neglected to oppose the sale, or to notify the sheriff that the property was his." The court did not err. A sheriff must, at his peril, avoid seizing, under execution, any other property than that of the defendant. It is not enough that he should presume, even on strong-grounds, that the property is the defendant's; he must know it. A person whose property is illegally taken by the sheriff, as belonging to the defendant in an execution, is not bound, on receiving information of the fact, to give any notice to the sheriff. He may at once seek relief by a suit, unless he wishes to avoid costs, by making an amicable demand.

On the merits the plaintiff is in possession of a verdict.

The facts are, that he had rented a field, the property of the defendant in the *fi. fa.*, and that the sheriff seized the cotton raised thereon, to satisfy his co-defendant's execution. The plaintiff

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worked six slaves on the field, and had the necessary oxen and farming utensils, but was aided by the defendant in execution, who had two slaves, and a woman with a small child. The testimony does not enable us to ascertain, whether the plaintiff was to remunerate the defendant in the execution, for the rent of the land and the labor of his slaves, by a portion of the crop, or otherwise. However, as he has restrained his claim to three-fourths of the cotton, we assume that one-fourth of it was the property of the latter. As the sheriff had great difficulty in ascertaining the rights of the parties to their respective portions of the crop, vindictive damages ought not to be given against him. It appears that the cotton sold for one cent and a half a pound in the seed; which, in our opinion, is equivalent to six cents of clean cotton; but the plaintiff is entitled to the value of his property illegally seized, and cannot be compelled to remain satisfied with the price at which the sheriff sold it. A witness deposes that he sold his cotton, that year, at eight cents a pound. The plaintiff has not enabled us to ascertain what would be the expense of carrying the cotton to the gin, the toll claimed by the keeper, the freight to market, or the charges attending the sale, so that we are unable to say whether the purchaser of the cotton at a cent and a half in the seed, had a better bargain than if he had purchased the witness' cotton at eight cents. We, therefore, assume that the cotton was sold by the sheriff at its fair value. It brought \$228 21. The plaintiff is entitled to three-fourths thereof, or \$171 15½. The plea of the sheriff's co-defendants, that they did not authorize the seizure of the plaintiff's property, cannot avail them. It was seized by a person whom they had employed to make the amount of their judgment. They would have had the benefit of his services, had he acted correctly; and they are bound to indemnify the party who was injured if he acted otherwise. *Qui sentit commodum, debet sentire et onus.*

It is, therefore, ordered, that the judgment be annulled, and that the plaintiff recover from the defendants, *in solido*, the sum of \$171 15½, with costs in the District Court; those of the appeal to be borne by the plaintiff and appellee.

Stevens, for the plaintiff.

L. Janin, for the appellants.

The State v. The Judge of the Court of Probates of New Orleans.

**THE STATE v. THE JUDGE OF THE COURT OF PROBATES OF
NEW ORLEANS.**

The executors appointed by the testator, or, in case of their failure to act, a dative testamentary executor, are the only persons competent to carry the provisions of a will into effect.

One who claims to be put in possession of an estate as universal legatee, must proceed contradictorily with the testamentary executors, or dative testamentary executor; if there be neither, he must cause a dative testamentary executor to be appointed. C. C. 1000, 1001, 1002, 1003. And so of successions administered by curators. C. C. 1181.

APPLICATION for a mandamus to the Judge of the Court of Probates of New Orleans, *Bermudez, J.*

L. C. Duncan, for the applicant.

SIMON, J. The applicant states that he is the universal legatee of James Lally, whose will was ordered to be registered in the Court of Probates of the city of New Orleans, and to be executed; (referring us to 1 Robinson, 269,) and that the will was accordingly registered and ordered to be executed, by the Judge of the Probate Court. He further represents that he has offered to the Court of Probates proof of his personal identity, and of his right to be recognized as the universal legatee of the estate, and has petitioned that court to be recognized as such and to be put in possession of the estate, but that the judge refuses to receive the evidence offered, to recognize him as the universal legatee of the deceased, or to put him in possession of the estate. He prays that the Judge of Probates may be ordered to show cause, why a writ of mandamus should not be issued, directing him to comply with his demands.

To this rule, the Judge of the Court of Probates answered: that the petitioner was absent from the state at the date of the registry and execution of the will, and never has been a resident of Louisiana; that the applicant's petition does not pray that the testamentary executors of the deceased may be cited and compelled to account; that the judge is inhibited by law from pronouncing on the petitioner's claim, so long as the time allowed to the executor to answer shall not have expired; and that the will in

question is administered by a foreign testamentary executor living at and domiciliated in New-York; &c. He proceeds, in his answer, to review and comment on a decision of this court, in connection with a law passed by the Legislature, at its last session, in relation to foreign testamentary executors, and such executors as are absent from the state; he endeavors to show the difficulty of citing a foreign executor; argues much at length in support of his interpretation of the law of 1842, which he calls *an explanatory law*; and relies upon divers French authorities, which he copies in his answer, to convince us that the law of 1842, as a declaratory law, ought to destroy the effect of our former decisions, so far as they have not acquired the force of *res judicata*. The last part of the learned judge's answer was totally uncalled for by the question which the application presents; it has nothing to do with the object of the proceeding; and, therefore, there was no necessity for introducing in this case a matter so entirely disconnected with the real point at issue.

This tribunal has always shown the greatest respect for the enactments of the Legislature, and is not conscious of ever having failed to exhibit a constant and uniform readiness to conform its decisions to the true will and real intention of the law maker. This we consider to be one of the most important of our official and constitutional duties; and whenever a question shall arise before us, under the law of 1842, we shall be ready to give to it such construction and interpretation as our best judgment and most mature deliberation and consideration may suggest.

We understand the question presented in this case, not to relate to the appointment or confirmation of a foreign testamentary executor, but to be merely whether the applicant, as universal legatee of James Lally, can be allowed to proceed *ex parte* to cause himself to be recognized as such, and to take possession of the estate? The petition presented by the applicant to the Court of Probates does not pray that the executor, or any other administrator may be cited, nor does it contain any allegation showing that the estate is under the administration and in the possession of any one, by whom it should be delivered to the universal legatee. It does not show that any executor has ever been qualified or confirmed, but simply states that the deceased never was mar-

ried, and left no forced heir, whose existence might present an impediment to the institution of the petitioner as his universal legatee. The petition represents, however, that the particular legacies specified in the will, have been paid.

This is an anomalous proceeding, which this court cannot sanction. The will shows that two testamentary executors were appointed by the deceased. If they have refused to accept, or have failed to qualify, or if they be in any manner disqualified from acting as such in this state, under our laws, it is clear that an executor should be appointed by the Judge of Probates, *ex officio*. Civil Code, art. 1671. It does not appear that any step has ever been taken to put the estate in due course of administration in Louisiana, except the proceeding had last year for registering the will, and ordering it to be executed. 1 Robinson, 269. Now, in the case of *Sterlin's Executor v. Gros*, this court decided, (5 La. 106,) that the executors of a will, or, in case of their neglect to act, a dative testamentary executor, are the only persons competent to carry its provisions into effect; and we are not prepared to say that a universal legatee under a will is entitled to the possession of the estate, if there be a testamentary executor, or, in case of there being none, without causing a dative testamentary executor to be appointed. The petitioner could not, therefore, demand to be put in possession of the estate as universal legatee, in any other manner than contradictorily with the testamentary executors appointed by the deceased, or, in their default, with the dative one appointed by the judge.

This is also shown by articles 1000, 1001, 1002, and 1003 of the Code of Practice, the first of which provides that, "when the heirs, or other persons entitled to successions, which are administered by testamentary executors, shall present themselves, they shall present a petition to the judge who appointed or confirmed the executors, praying that *they may be cited* and compelled to account," &c. Article 1002 says that the judge shall pronounce on the applicant's claim so soon as the time allowed *for the executors to answer* shall have expired; and article 1003 declares that, if the judge discovers that he is entitled to the succession, *he shall put him in possession of it, and shall direct the executor to render an account, &c.* The law is also the same with re-

gard to successions administered by curators. Civil Code, art. 1181.

We conclude, therefore, that the proceedings under consideration, could not be carried on *ex parte*; that the action is premature, if there be no person qualified to act as testamentary executor upon whom the petition of the applicant could be served; and that the Judge of the Court of Probates did not err in refusing to hear him and to receive his evidence.

Rule discharged.

ABRAHAM F. RIGHTOR v. FRANCISCO ALEMAN.

Where it was agreed between the payee and maker of a note, that payment should not be exacted in the event of a certain action being decided against the latter, and the maker afterwards, by compromising the suit, renders the fulfilment of the condition impossible, his obligation to pay will become perfect. C. C. 2035.

The maker of a note given to the payee for surveys made by the latter at his instance, cannot resist payment on the ground that the amount was out of proportion to the value of the services rendered. Such a case is not one in which relief can be had on the ground of lesion. C. C. 1854, 1855, 1856, 1857.

APPEAL from the District Court of Ascension, *Nicholls, J.*

M. Taylor, for the plaintiff.

R. W. Nicholls, for the appellant.

MORPHY, J. The defendant has appealed from a judgment rendered against him on a promissory note for \$1000, which he drew to the order of the petitioner. The defence set up below, and insisted upon in this court, is error, and a failure of consideration. We have been unable to perceive, from the evidence, that there was any error, on the part of the defendant, in executing the note sued on. The consideration, for which it was made, is shown by a receipt produced by the defendant in the following words to wit:

"Received of Mr. F. Aleman his note for one thousand dollars, it being the price agreed upon for the surveying of the land sold by the heirs of P. Aleman to La Ferrière. Now it is agreed that

should the survey of mine not be sustained by the courts, then I am to deliver up said note to F. Aleman ; but should it be sustained, then it is to be paid in full."

A. F. RIGHTOR.

The record shows that the defendant and his co-heirs, sold to Rightor & Scuddy a plantation containing six *arpens*, on the Bayou Lafourche, by a depth of eighty *arpens*, the side lines diverging thirteen degrees more or less, &c., which plantation was afterwards sold by the plaintiff and Scuddy to La Ferrière Levesque ; and that in this last sale, the defendant intervened, in his own name and that of his co-heirs, and received the notes of La Ferrière, secured by mortgage on the property, in payment of the price yet due to them by their vendees. La Ferrière having failed to pay his notes at maturity, the heirs of Pedro Aleman took out an order of seizure and sale, which La Ferrière enjoined, on the ground of an alleged deficiency in the quantity of land sold to him, exceeding one-twentieth part, and upon other grounds which it is unnecessary to notice. The defendant, in order to enable the heirs of Aleman to prosecute successfully their suit with La Ferrière, made with the plaintiff the contract which gives rise to this controversy ; but, without awaiting the trial of their case, they entered into a compromise with La Ferrière, and gave him two thousand dollars ; thus putting an end to the suit.

The testimony satisfies us, as it appears to have satisfied the court and jury below, that the plaintiff performed the services for which he received the note sued on. The defendant and his co-heirs, by compromising with La Ferrière, rendered impossible the fulfilment of the conditions contained in the receipt delivered by the plaintiff ; the defendant's obligation to pay, thereby became perfect, and he cannot be permitted to say that the consideration had failed. Civil Code, art. 2035.

The defendant has attempted to show that the amount claimed is out of all proportion to the services rendered by the plaintiff. This defence, even if sustained by the evidence, cannot be listened to. A real consideration having been proved, the defendant cannot invalidate his own voluntary contract by showing lesion. Relief on account of lesion is a remedy which the law allows only

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in certain cases, of which this is not one. Civil Code, art. 1854, 1855, 1856, and 1857.

Judgment affirmed.

ELIZA R. WHITTEMORE v. JACOB J. WATTS, Sheriff.

Appeal by intervenors, on whose claims no judgment had been pronounced, from a judgment overruling an exception to answering taken by defendant on the ground of the want of proper parties, and ordering a judgment by default to be entered against him. *Held*, that the intervention not having been acted upon, and no final judgment having been rendered against the defendant, the appeal must be dismissed.

APPEAL from the District Court of Livingston, *Jones, J.*

Greiner, for the plaintiff.

Hoffman, for the appellant.

MARTIN, J. This suit was commenced by a petition to the judge of the parish of Livingston for an injunction to restrain the sheriff from proceeding to the sale of certain property of the petitioner's husband, in violation of her legal mortgage thereon. The injunction was granted. John Taylor and others, the plaintiffs in the execution enjoined, intervened in order to obtain a dissolution of the injunction; the defendant filed an exception, urging that as the plaintiffs in the *fi. fa.* were not parties to the proceedings instituted by the petitioner, he (defendant) was not bound to answer alone being without interest in the cause, having acted only as a ministerial officer. The exception was overruled, and judgment by default taken against the sheriff. [No judgment was pronounced upon the intervention.] The intervening parties have appealed.

The appellee prays for the dismissal of the appeal on the following grounds:

First. That the citation was served by the deputy sheriff, when it ought to have been by the Coroner. Code of Practice, articles 771, 772.

Second. That the judgment is not signed.

Third. That the sheriff is not a party to the appeal, otherwise

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than by his acceptance of service of the petition, and waiver of that of the citation.

Fourth. That the bond is insufficient.

Fifth. That the citation of appeal does not belong to the case.

These grounds for dismissal might be cogent if the defendant were the appellee; but the intervening party is the appellant, and the plaintiff in the injunction, the appellee. There is, therefore, a better ground of dismissal than any of these. The exception, or intervention of the present appellant, has not been acted upon by the first judge. The appellant, therefore, is without a cause of complaint; besides, there is no final judgment against the defendant, who is not a party to the appeal, but only a judgment by default.

Appeal dismissed.

THE STATE v. THE JUDGE OF THE COMMERCIAL COURT OF
NEW ORLEANS.

The power to issue writs of prohibition was conferred on the Supreme Court merely as a means of enabling it to exercise its appellate jurisdiction. Like the writ of mandamus, a prohibition may be issued even where a party has other means of redress, if the slowness of ordinary legal proceedings be likely to produce such immediate injury as ought to be prevented.

The writ of mandamus is given to enable the Supreme Court to command inferior courts to act where delay would cause damage and injustice; and the writ of prohibition to restrain them, where their acting without authority would produce similar results.

The writ of prohibition is an extraordinary one, and should be issued only in cases of great necessity, clearly shown, and where the party has applied, in vain, to the inferior tribunals for relief.

APPLICATION for a prohibition to the Judge of the Commercial Court of New Orleans, *Watts, J.*

Roselius, for the application.

W. Christy, Chinn, and Hoffman, contra.

GARLAND, J. Dubois, a member of the firm of Dubois & Kendig, represents that Benjamin Robertson had obtained a judg-

ment against them in the Commercial Court, and issued an execution thereon, by virtue of which the sheriff was about to sell property of great value, and that N. C. & L. Folger had commenced a suit against them by attachment, and also seized certain property. He avers, that since the institution of these suits, he has been compelled to apply for the benefit of the Bankrupt Law, passed by Congress in 1841; that the usual order has been granted on this application, and the notices published, but that no decree has been pronounced, nor any assignee appointed; that, in conformity to law, he has surrendered all his property, and that of the firm to which he belongs. He avers, that by his application, all judicial proceedings are arrested, but that, notwithstanding, the Judge of the Commercial Court, and the sheriff thereof, persist in proceeding with the aforesaid suits and execution, and will sell the property surrendered, unless prevented. The petitioner, therefore, prays that a writ of prohibition may be directed to the aforesaid judge, and that the sheriff may be enjoined from further proceedings.

A rule was taken on the judge and sheriff to show cause why a prohibition should not be issued, and an injunction was issued temporarily, until the case could be heard.

The judge showed for cause:

First. That it is not alleged, in a direct manner, that an application was made to stay proceedings in the said suits, nor that any proof of facts was made, sufficient to authorize him to arrest the proceedings; that if such facts existed, they ought to have been shown; and that no prohibition ought to be issued, until a regular application, supported by evidence, had been made to the inferior court, and been acted on.

Second. That the application is only on the part of one of the defendants, to wit, Dubois; and that it is not shown that the proceedings can be arrested as to one, and not as to the other.

Third. That the power to issue a prohibition given to the Supreme Court, is only in aid of its appellate jurisdiction; and that it is not shown that the Commercial Court has refused an appeal, nor that it is proceeding in disregard of one.

Fourth. That this tribunal has no power to act as an aid to the jurisdiction of the District Court of the United States.

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For these causes, the judge prays that the rule may be discharged.

The judge proceeds to say, that Robertson had obtained a judgment against Dubois & Kendig about the last of November, 1842, on which an execution had been issued; but that he does not know what has taken place under it.

He shows for further cause, that nothing appears on the minutes or records of the court, to show that any application had been made to arrest the proceedings for the reasons assigned in the petition, and that he has no recollection of any oral application to that effect.

He further shows, that the case of the Folgers was commenced by attachment, under which a number of horses and carriages were seized; and that the plaintiff took a rule on the defendants to show cause why the property seized should not be sold, on the ground that it was of a perishable nature, and that the expenses of the horses would, before the decision of the suit, amount to as much as they were worth. When this rule came on for trial, the counsel for Dubois & Kendig appeared, and stated, orally, that Dubois had applied to be declared a bankrupt, since the rule was taken, and one of them had a newspaper in which he said that the notice was published. The judge told the counsel that he thought it would not prevent him from proceeding; that it was best the property should be sold; and that it was immaterial whether the sheriff or the marshal sold it, as the money was ordered to be paid into court, where it would remain until the fate of the application of Dubois should be known, when the assignee might claim it. The rule to have the property sold was made absolute, whereupon the counsel intimated an intention to appeal; but the judge expressed some doubt as to the right of appeal, and it was not applied for.

It is true, as stated by the Judge of the Commercial Court, that the writ of prohibition is only one of the means by which this court can exercise its appellate jurisdiction. An application for it, is one of the modes by which a case may be brought before us for examination; and it may be issued, like the writ of mandamus, even where a party has other means of relief, if the slowness of ordinary legal forms is likely to produce such immediate

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injury or mischief as ought to be prevented. The writ of mandamus is given to enable this tribunal to command inferior courts to act, in cases where delay will cause damage and injustice; and that of prohibition, to restrain them where acting without authority, would have the same effect. We have heretofore said that this is an extraordinary writ, and should only be issued in a case of great necessity, when clearly shown; and before we will issue it, it must appear that the applicant has applied, in vain, to the inferior tribunals for relief. In the present instance, no such showing is made.

As to the case of Robertson, the record is not before us, and there is nothing to show that any application was ever made to the Commercial Court, to arrest the proceedings on the execution, issued in his favor. The judge says that there never was; and nothing from the records of the court is produced to disprove his statement, or to cause us to doubt its correctness.

In the case of the Folgers, it appears from the affidavit of the petitioner and the answer of the judge, that some conversation took place as to the application of Dubois for the benefit of the Bankrupt Act, at the time that the rule before mentioned was called for trial. But the record does not show that any objection or exception founded on that fact was raised. No legal evidence of it was exhibited, nor does it appear that the judge ever decided on it. What occurred, seems to have been nothing more than a conversation between the judge and the counsel. The former says that he made no decision, further than saying, when it was stated orally that an application to be declared a bankrupt was pending, that he "saw nothing that prevented Dubois from appearing as defendant in the rule." Upon such a statement of facts, we do not think this court has any power to interfere, without assuming original jurisdiction in the case.

Rule discharged.

Ex parte Nicholls.

EX PARTE THOMAS C. NICHOLLS.

Every final judgment must be signed separately by the judge, after having been read in open court. C. P. 546. Until signed, it is not final. The signature must bear a precise date, as it would be otherwise impossible to ascertain from what day the mortgage, resulting therefrom when recorded according to law, would take effect. The signature of the minutes of the court, required to be kept by art. 777 of the Code of Practice, is not such a signature of the final judgments rendered by it, as the Code requires. This signature of the minutes is merely to attest the correctness of the entries made by the clerk.

APPEAL from the District Court of Ascension, *Cooley, J.*, presiding.

R. W. Nicholls, for the appellant.

Roman, contra.

BULLARD, J. Thomas C. Nicholls having sued out a monition under the act of 1834, calling on all persons to show cause why a sheriff's sale to him of a slave should not be homologated, the defendants in the execution showed for cause that the judgment upon which the execution was issued had not been signed by the judge. The sale was, therefore, set aside, and Nicholls has appealed.

It appears that the judgment written on the back of the petition was not signed until after the execution was issued, but that the judgment had been previously entered, with others, on the minutes of the court, and that the minutes had been signed by the judge before the execution was issued.

Article 546 of the Code of Practice declares that, "the judge must sign all definitive or final judgments rendered by him, but he shall not do so until three judicial days have elapsed, to be computed from the day when such judgments were given." A judgment thus signed becomes the property of the party in whose favor it is rendered, and can no longer be altered. Art. 548.

These articles appear to contemplate that each final judgment shall be signed separately, as well as read by the judge in open court.

The clerk, it is true, is required to keep, at least, two Record Books, in one of which he is to set down, in order, the titles of all the causes depending before the court, &c., and in the other, all

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the orders and judgments rendered, as well as the motions made by the parties, or their counsel. Articles 775, 776, 777. This last record constitutes the minutes of the daily proceedings of the court, and the signature of them, at the close of the term, does not appear to us such a signature of final judgments as the code requires. The argument that such signature would suffice, proves too much; for, suppose a judgment rendered on the last day of the term upon the verdict of a jury, it could not become final under three days, notwithstanding the signature of the judge to the minutes on the same day. Such signature is intended, merely, to attest the correctness of the entries, made by the clerk, of the proceedings of the court.

It is clear that until a judgment is signed it is not final: and it is important that the signature of each judgment should bear a precise date; otherwise it would be impossible to ascertain from what day the mortgage resulting therefrom would take effect upon the judgment being recorded in the manner originally provided by the Civil Code, which declares that the judicial mortgage takes effect from the day on which the judgment is pronounced, if duly recorded. Art. 3290. If the inscription be made within six days from the signing of the judgment, it shall have its effect in certain cases, from its date. Art. 3319. Although this has since been changed, it shows what was originally the view of the legislature.

Upon a careful consideration of the different provisions of the codes, and what we understand to be the uniform practice of the courts of the first instance, we conclude that the law requires, that each final judgment shall be signed separately by the judge.

Judgment affirmed.

Grayson and others v. Houston and others.

**WILLIAM P. GRAYSON and others v. ROBERT B. HOUSTON
and others.**

An obligation to pay a certain sum on a particular day, to be discharged by the delivery of a slave of a certain value, is an alternative obligation, from which the debtor may exonerate himself by delivering either of the two things; but he cannot force the creditor to receive a part of one, and a part of the other. So where the creditor has the election, he cannot take a part of the things to be paid or delivered.

APPEAL by the plaintiffs from a judgment of the Commercial Court of New Orleans, *Watts, J.*

Finney and Huston, for the appellants.

P. W. Farrar, for the defendants.

GARLAND, J. This action is brought on a note of the defendants, for eleven hundred dollars, to be discharged on a day subsequent to its date by the delivery of a negro boy worth eight hundred dollars, to be valued by two disinterested persons.* The defendant Robert B. Houston, by the attorney appointed by the court for his defence, answers that he is the principal debtor, and that his co-defendants are his sureties only; that before the maturity of the note he produced a negro boy, who was valued at seven hundred and fifty dollars, by appraisers, one chosen by the payee of the note, and another by himself; that he was entitled to a credit on the note for a sum due to him by the payee; that he tendered the boy, and a credit on the note, to the payee, who refused to receive them, and transferred the note with a view to follow the respondent's crop to New Orleans, where he is obliged to send it for sale out of the State of Mississippi, in which both parties reside, and that an attachment has accordingly been levied on it in New Orleans. The answer concludes by an averment,

* The note was in these words:

"\$1100. Due M. D. Haynes, eleven hundred dollars, on the 10th day of January next, which can be discharged with a negro boy worth eight hundred dollars, to be valued by two disinterested persons.

Nov. 20th, 1841.

R. B. HOUSTON,	[SEAL]
JAS. P. DUNN,	[SEAL]
J. N. HOUSTON,	[SEAL]"

that the boy has ever since remained in the possession of the respondent, ready to be delivered to the payee or holder of the said note. The defendant, John N. Houston, pleaded the general issue. The other defendant, Jas. P. Dunn, did not answer, and it does not appear that any of his property was attached. The first judge was of opinion, that the principal obligor had established that he produced a negro boy, who had been appraised at seven hundred and fifty dollars, and that he was entitled to a credit on his note for fifty dollars. He was also of opinion, that, if the parties were within the jurisdiction of the court, it would be equitable to allow the debtor a reasonable time and place to make the tender; and he thought the latter ought not to be deprived of this advantage, in consequence of having been sued out of the state in which he resides. He thereupon made an interlocutory decree, allowing time for the delivery of the boy, at the expiration of which, judgment was to be entered against the plaintiffs, if the delivery was made, and for them if it was not.

The evidence shows, that about the time when the note fell due, it was presented to R. B. Houston at Oxford, in Mississippi, where he then was, having brought a slave from his plantation for the purpose of discharging it. The slave was appraised at seven hundred and fifty dollars, by persons chosen by Houston and one Butler, who acted as the agent of Haynes, the obligee in the note, and was instructed to receive such a negro as was specified. After this appraisement, it does not appear that Houston requested Butler to take the negro and give up the note. On the contrary, he stated that a credit must be allowed on the note for fifty dollars, which Haynes owed him, and that he would take the negro, who had been appraised, back again to his plantation, and give Haynes another when he came up, at which time they would settle the whole matter, and he would pay hire for the slave if required. To the negro's being taken back to the plantation, Butler says that he assented, or made no objection, because he did not intend to receive him, as he was not appraised at eight hundred dollars, and no tender of him had been made. Since that time, it does not appear that the defendant has made any effort to discharge his obligation; and the slave remains in his possession.

The obligation contracted in this case is an alternative one.

The debtor binds himself to pay a certain sum of money, or to deliver a slave of a certain value. He had his choice which of the two he would perform, and, perhaps, had it until the time of the trial of the case, but he has failed to make the election, and the obligee now asserts the right to choose which obligation he will enforce, and claims the money stipulated to be paid.

The defendant has made no such tender or attempt to fulfil his obligation as will discharge him. The claim which he sets up, to give a negro worth seven hundred and fifty dollars, and compensate the balance of the demand, is inadmissible. He has shown no such right, according to the law of the place where the contract was made, and clearly he has none such according to our law. The Civil Code, article 2064, declares that the debtor may exonerate himself by delivering one of the two things promised, but that he cannot force the creditor to receive a part of one and a part of the other. Pothier, in his Treatise on Contracts, No. 247, says, that in such a case the debtor has the election which of the things he will pay, but that he cannot pay parts of each. As, if a man promises to pay twenty crowns, or to deliver an *arpent* of land, he cannot discharge himself by paying half the money and delivering half the land. So where the creditor has the election, he cannot take a part of the different things to be paid or delivered.

If the debtor in this case, had a right to discharge his obligation, by delivering a slave worth \$750, and by compensating the balance of the \$800, he could, upon the same principle, deliver a slave worth \$400, and compensate or pay \$400 more, and thus discharge himself. This he cannot do.

We think the inferior court erred in the judgment it rendered. Such a decree it seems to us never could be executed, and lays the foundation for further litigation. If the plaintiffs did not make out their case, a nonsuit should have been entered or final judgment rendered; and if the defendants have not discharged their obligation, they should be condemned.

As no judgment has been rendered for or against the garnishees, and that as to the plaintiffs is erroneous, we think the best course to pursue is to remand the case for a new trial.

The judgment of the Commercial Court is, therefore, annulled

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and reversed, and the case remanded for a new trial, with directions to the judge, in the trial thereof, to conform his judgment to the principles herein expressed, and otherwise to proceed according to law ; the appellees paying the costs of the appeal.

ROSALIE BORNE v. JAMES PORTER and others.

Where an injunction has been obtained to stay proceedings under writs of *fi. fa.* issued at the suit of different parties, the latter will be entitled to sever in their defence, though the sheriff may have levied on the same property to satisfy all the writs. A District Court cannot arrest, by injunction, process issued from a Parish Court.

APPEAL from the District Court of Lafourche Interior, *M'Alister*, presiding.

Boucherville, for the appellant.

Beatty and *M. Taylor*, contra. The defendants were properly allowed to sever in their defence. Code of Practice, art. 570. 5 Mart. N. S. 87. The District Court had no authority to enjoin process issued from a Parish Court. Code of Practice, arts. 617, 629, 395, 397. *Oger v. Daunoy*, 7 Mart. N. S. 658.

BULLARD, J. The appellant, having sued out of the District Court, an injunction to stay proceedings on four writs of *fi. fa.*, issued at the suit of different parties, and three of which were to enforce judgments rendered in the Parish Court, the defendants were permitted to sever in their defence, and the injunction having been dissolved, she has appealed.

We are of opinion the court did not err, in permitting the parties to sever in their defence. There was no privity between them. Each had his separate judgment, which he was seeking to enforce, although the sheriff had levied on the same property in order to satisfy all the writs.

It is equally clear, that the District Court was without authority to arrest, by injunction, process issued from the Parish Court. This question was fully considered and decided in the case of

Combs and others v. Dodd.

Oger v. Daunoy, 7 Mart. N. S. 656. The present case does not present an exception to the general rule recognized in that.

Judgment affirmed.

TENNESSEE COMBS and others v. WILLIAM DODD.

Decision in case of *Thompson v. Schlatre*, 13 La. 115, affirmed.

Where the proclamation of the President, offering a portion of the public lands of the United States for sale, is produced together with patents to a purchaser at such sale, the court will not look beyond them to ascertain whether the lands had been regularly surveyed.

APPEAL from the District Court of Iberville, *Deblieux, J.*

Robertson and Talbot for the plaintiffs.

Labauve, for the appellant.

BULLARD, J. The plaintiffs, who are the widow and heirs of George Sharp, assert title to a tract of land purchased by their ancestor from the government of the United States, in the rear of the plantations now owned by Joseph Schlatre and Michel Schlatre, being sections 51 and 61, in Township 9, Range 12 east, in the South Eastern District of Louisiana. They complain that the defendant, William Dodd, has committed trespass thereon, and pray for damages. The defendant, on the other hand, claims to be the owner of the *locus in quo*, by purchase, as a double concession. There was a verdict for the plaintiff for the land, and for \$180 damages, which being sanctioned by the judgment of the court the defendant appealed.

The tract of land on which the alleged trespass was committed, is the same which was in controversy in the case of *Thompson v. Schlatre*, 13 La. 115. All the facts attending the purchase by Sharp are detailed in the report of the case, and the court there held that Sharp, having made the first purchase from the United States, acquired the best title.

It is now urged by the appellant, that Sharp could not acquire any title to the land, because the same not having been regularly surveyed was not offered at public sale, and, consequently not subject to private entry. To this it is enough to say, that the

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proclamation of the President is shown, together with patents to Sharp as a purchaser, and we do not consider ourselves authorized to look beyond them, in order to inquire whether the lines subdividing the sections into quarters were in fact run out and marked upon the plots. The question of title was decided in the case above alluded to, according to our present views and understanding of the rights of the parties.

Judgment affirmed.

JOHN SLIDELL v. ELIZABETH ANN RIGHTOR and others.

Injunctions, arresting summary proceedings, apparently authorized by the parties, are required by the Code of Practice, (arts. 740, 741, 751, 756,) to be tried summarily; but the parties cannot be deprived of any of the means of procuring evidence, within a reasonable delay.

APPEAL from the District Court of Ascension, *Nicholls, J.*

Beatty and *T Slidell*, for the appellant.

Ilisley and *R. W. Nicholls*, for the defendants.

BULLARD, J. This is an injunction to stay proceedings on an order of seizure and sale, sued out by the plaintiff on the following allegations, to wit: That the petitioner, John Slidell, together with others, and particularly H. T. Williams, purchased of Rightor and wife, a large tract of land commonly called the Houma's Grant. That the petitioner's share of the purchase was one-ninth, for which he gave several notes for \$3587 85 each, payable at the Union Bank, a part of which have been paid, and that on one of those remaining unpaid this order of seizure has been obtained. The petition alleges, that the proceedings are illegal, because, although the plaintiff is now temporarily absent, he has been for many years domiciled in the city of New Orleans, and has not been duly notified, and that a curator *ad hoc* was improperly appointed to represent him; that authentic evidence of the mortgage was not submitted to the judge when the order was granted, and that the order called for interest from the 17th

day of May, 1842, whereas it was not exigible until the 22d day of June, when the note was protested, or at least the 20th of May when it came to maturity.

The petitioner alleges, that he is entitled to have the sale cancelled and rescinded, because he was induced to become a purchaser of one-ninth by the urgent instance and request and declarations of Henry T. Williams, who pressed him to enter into the contract, Williams being then the Surveyor General of the United States; that Williams averred himself to be well acquainted with the land and titles, and declared that the title had been fully recognized by the General Land Office of the United States, and that, to deceive the petitioner, he offered to become part purchaser; but that while making these representations and becoming ostensibly interested in the purchase, Williams was, in truth, a secret partner with Rightor, and jointly interested with him in that portion of the land derived from Laville and Conway, to wit, about forty thousand acres; that there was a fraudulent combination between Rightor and his wife, and Williams, which entitles him to have the sale thus obtained rescinded; and that the fraud and collusion had been but recently discovered.

Such, in substance, are the grounds upon which the petitioner sought relief; but his injunction was dissolved, and he has appealed.

It appears, that on Saturday, the fifth day of the first term after the injunction had been granted, the plaintiff applied for a commission to take the depositions of the Solicitor of the General Land Office and others, at Washington city; and another, to take that of C. F. Zimpel, at Berlin, in the kingdom of Prussia. This application was supported by his affidavit that the testimony of those witnesses was material to his just defence; that he could not safely go to trial without it; and that the affidavit was not made for delay. The commissions were refused, and also a subsequent motion for a continuance, founded on the ground of the absence of other witnesses whose depositions were material. It appears, from a bill of exceptions, that the continuance was refused, because an earlier application should have been made for a commission to take the testimony of the witnesses in New Orleans, the judge being of opinion that a greater degree of dili-

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gence is required in cases of injunction, where the proceedings are summary, than in ordinary cases.

It appears to us that the court erred in refusing the commission. The affidavit appears to have been such as is required by article 436 of the Code of Practice, as amended by the act of 1826. Nothing more is required than the oath of the party that the testimony is material. Considering the distance at which the witnesses reside, and the improbability of getting a return of the commission within the time, even if it had been taken out on the first day and before the cause was at issue, we think the application was in time. If it be true, as alleged and sworn to by the plaintiff in the injunction, that Williams, one of the ostensible purchasers, was, in fact, fraudulently colluding with the vendors, and was himself one of them in interest, it is worthy of serious consideration whether it be not such a fraud as vitiates the whole contract. Time and opportunity, we think, ought at least to have been afforded, to furnish evidence in support of such an allegation. Although the Code requires that cases of this kind, which arrest the summary proceedings apparently authorized by the contract between the parties, shall be tried summarily; it does not, by any means, follow, that parties are to be deprived of any of the means of procuring evidence, within a reasonable delay.

It is, therefore, decreed, that the judgment of the District Court be reversed and the injunction reinstated, and that the case be remanded for further proceedings according to law; the appellees paying the costs of the appeal.

Church of St. Francis of Pointe Coupée v. Martin.

**THE CONGREGATION OF THE ROMAN CATHOLIC CHURCH OF
ST. FRANCIS OF POINTE COUPÉE v. JEAN MARTIN.**

The church-wardens appointed under the act of 14th March, 1814, incorporating the congregation of the Roman Catholic Church of St. Francis of Pointe Coupée, are in their corporate character, the legal owners of the property which that act authorizes them to hold for the purposes therein specified. They are its sole temporal administrators, and cannot be controlled in its administration by the clergy. They are responsible to the congregation alone, who may elect others in their place, in case of misuse or abuse of the powers conferred on them by law.

(Neither the pope, nor any bishop of the Roman Catholic Church has any authority but a spiritual one, within this State.

Courts of justice sit to enforce civil obligations only, and will not attempt to enforce those of a spiritual character.

The church-wardens of the church of St. Francis of Pointe Coupée have the exclusive power of fixing the salary of the parish priest, or the tariff of fees to be paid by the parishioners for marriages, burials, funeral services, &c. No such power can be exercised by the pope or any bishop.

The third article of the treaty of Paris, of the 30th April, 1803, between the United States and the French Republic, by which the territory of Louisiana was ceded to the former, ceased to have any effect after the admission of Louisiana into the union on the 30 April, 1812.

APPEAL from the District Court of Pointe Coupée, *Nicholls, J.*

The petitioners, a corporation established by law, under the title of "The congregation of the Roman Catholic Church of Pointe Coupée," represent: that in the beginning of 1834, the Reverend Jean Martin was appointed curate of the parish of Pointe Coupée, by the Roman Catholic bishop of New Orleans: that at a meeting of the church-wardens, who were the administrators of the affairs of the corporation, it was resolved, on the 1st July, 1834, to allow the defendant an annual salary of \$1000 a year, commencing from 1st April, 1834, for his services in the two churches in that parish, it being stipulated at the time, that he should receive no other compensation, and that the usual fees for interments, marriages, &c., should be the property of the petitioners: that the defendant assented to these terms, on being allowed a further sum of \$40 a year, for certain expenses: that the church-wardens having reason to be dissatisfied with the official conduct of the defendant, by a resolution of the 2d December, 1835, re-

pealed the resolutions allowing the salary, and declared that it should cease to be paid after the 31st of December of that year: that the defendant, on being informed of the adoption of the resolution, acquiesced in it, stating that he would gladly leave the parish, and only desired to be paid for his services to the end of 1835: that the whole amount due to the defendant has been paid to him, and even more: that notwithstanding the resolution of the 2d December, 1835, and the defendant's assent thereto, he continues to claim to be the curate of the parish, and to be entitled to the salary and other perquisites: that the petitioners having always refused to acknowledge the justice of his claims, the defendant instituted at different periods, two suits against them, in the former of which he claimed \$2123,29, and in the latter a further sum of \$5045,46, for the salary to which he pretended to be entitled under the resolution of the 1st July, 1834, and for other expenditures made for the use of the church; and that after the evidence had been received on the trial of the first of the two suits, he discontinued both, notwithstanding which he still pretends to be a creditor for the amounts claimed in said suits.

Averring that the defendant has no claim whatever upon them, the petitioners allege, that any expenditures which may have been made by him were made for his own benefit, he having had the use of the church, the ornaments of the church, the graveyard, &c., since the 1st of January, 1836, and having, since that period, received all the fees for baptisms, marriages, interments, &c., amounting to \$10,000. They assert that by sect. 5 of the act of 24th January, 1838, the church-wardens are invested with full control over the property of the corporation, and that they may grant the use thereof to the curate of the parish, or deprive him of it, at their pleasure: that on the 23d of May preceding, the church-wardens passed a resolution calling upon the defendant to deliver to them the property of the petitioners in his possession: that the latter, though notified of said resolution, has refused to comply therewith; and by the illegal detention of the property, and by the injury which he has done to it, has caused them damage to the amount of \$1000.

The petition further represents, that a memorial, signed by a large number of the parishioners, was addressed to the bishop of

New Orleans, the proper ecclesiastical authority, praying for the removal of the defendant, and the appointment of another minister better suited to render spiritual assistance to the inhabitants of the parish; and that this request was refused, principally on the ground, that it would be unjust to remove the defendant until he should have been paid in full. The petitioners aver that the bishop was induced by the false representations of the defendant, to believe that they were indebted to him; whereby they have sustained further damage to the amount of \$1000. It is further represented, that the petitioners have demanded of the defendant the payment of the said two thousand dollars, and that he should desist from the assertion of any claim against them as alleged in his two suits, or bring a new action against them; but that he has refused to do either, continuing to vex and harrass them, to their damage \$1000. The petition concludes with a prayer, that the defendant may be condemned to pay \$3000, for damages as above mentioned; that he may be ordered to desist from asserting any claim against the petitioners, or be condemned to institute suit therefor forthwith; and that if any such claims be set up in answer to this petition, they may be declared unfounded.

The defendant answered by a general denial of all the allegations of the petition not admitted in his answer, and by a plea in reconvention. In the latter he avers that the plaintiffs are indebted to him in the sum of \$7661 12: that in the early part of 1834, he was appointed by the bishop of New Orleans, priest, or curate, of the parish of Pointe Coupée: that he began to discharge the duties of his office immediately after his appointment: that about the 1st July, 1834, the church-wardens did, as alleged in their petition, resolve to pay him an annual salary of \$1000 for his services, beginning from the 1st April, 1834, and afterwards allowed him a further sum of \$40 per annum: that he accepted the salary thus allowed him, and faithfully discharged the duties of his appointment as curate, in strict conformity with the rules of the Roman Catholic Church and the terms of his contract, from the 1st April, 1834, to 1st April, 1842, and that the plaintiffs became thereby, under their contract, indebted to him in the sum of \$8320, for eight years services, a part of which he acknowledges that he has received, leaving a balance due to him,

on that account, of \$6030. The defendant further claims, in reconvention, \$1682 92, for various articles purchased by him for the use of the church, or sums expended in its service. He avers that the contract between the plaintiffs and himself is still, and has always been in full force, and that the corporation was incompetent to annul it. He denies that he was ever notified of the resolution of the 2nd December, 1835, or ever consented to leave the parish; alleging, that he had no power to do so without the approbation of his superiors in the church. He admits the institution of the two suits alluded to in the petition, and the dismissal of one of them, but avers that the other is still pending. Finally; averring, that if the contract between himself and the plaintiffs, by which he was allowed \$1040 a year, has become extinct, he is entitled to that amount on a *quantum meruit*, and prays for a judgment for \$7661 12, with interest from judicial demand.

The suit pending between the defendant and the plaintiff was consolidated with this, by consent; the claims set up by Martin in the former, being re-asserted in his reconventional demand in the present action.

The material facts, proved on the trial, are stated in the opinion delivered by MARTIN, J. There was a judgment below, in favor of the defendant, on his plea in reconvention for \$6734 76, and costs, from which the plaintiffs have appealed.

L. Janin, for the appellants. Under the contract between the parties, the defendant can only claim payment of his salary till the end of the year in which he was notified that his services were no longer required. The contract is analagous to that commented on in the case of *The Orphan Asylum v. The Mississippi Marine and Fire Insurance Company*, 8 La. 181. It would be preposterous to contend, seriously, that the canon law can regulate such a contract between citizens of this state, merely because one of the contracting parties is a catholic clergyman. The acts of March, 1814, of 9th January, 1825, and of 5th January, 1838, define the duties and powers of the church-wardens of the church of St. Francis of Pointe Coupée.

Ilseley and Nicholls, contra. The defendant was duly appointed priest of the parish of Pointe Coupée, and continued to

discharge his duties as such until the filing of his demand in reconvention; he was, therefore, entitled to the amount claimed for his services as such. He could be removed only by the bishop or grand vicar. As to the claim for money advanced for the use of the church, see the case of *Marc v. The Church-Wardens of St. Martinsville*, 2 La. 5.

MARTIN, J. The plaintiffs are appellants from a judgment by which the defendant has recovered, in reconvention, the sum of \$6734 76, for his services as curate of the parish of Pointe Coupée, and for certain expenditures made by him for the church. By a resolution of the church-wardens of the 1st of July, 1834, a yearly salary of \$1000 was allowed to the defendant for his services, with a stipulation that he should not receive any part of the sums paid for burials and funeral services, and that he should attend the church on the Mississippi, and that on False River, saying mass two Sundays, at least, in each month, at the latter. A misunderstanding having taken place between the wardens and the defendant, the former, on the 2d of December, 1835, rescinded the resolution of the preceding year, resolving, however, that the salary should continue to be paid until the last day of that month. This resolution being communicated to the defendant about the 16th of January following, he replied that he had expected it, and would depart as soon as he should be paid what was due to him. Afterwards, the defendant received the sums paid for certain burials and funeral services. He declared that for the services, arrangements must be made with him, as he had no longer anything to do with the wardens. A witness, who acted as sexton and chorister during six years, deposes, that the defendant went during this time on occasional journeys to Avoyelles, where there was no curate, and also to Bayou Sara. The testimony clearly shows, that after the defendant was notified that the salary therefore allowed him would no longer be paid, he considered himself absolutely independent of the wardens; and, indeed, acted in open opposition to them, while they viewed him as having ceased to have any claim on them.

On these facts it has been contended, on the part of the appellee, and his counsel has endeavored to establish, by the testimony of the bishop of the diocese, and the *theological* of the cathedral,

that the defendant, having been appointed by the bishop, curate of the parish, could not, consistently with his duty, consent to the dissolution of the relation in which he stood to the church-wardens of the parish, until authorized so to do by the bishop; and, consequently, the relation still subsisting, that the plaintiffs were bound to continue the payment of the defendant's salary; that the bishop has the exclusive right of making a tariff of the casual emoluments of curates, or sums which the parishioners are to pay them for marriages, burials, funeral services, etc.; that the church-wardens have no authority to make such a tariff; that the plaintiffs have, however, established one for their parish, of which the bishop has always complained, and to which he has never given his sanction; and that some of the curates, instead of those emoluments, or a part of them, are remunerated by an annual salary, which varies from one thousand to twelve hundred dollars. The counsel has further urged, that, as curates are to be remunerated either by a salary or casual emoluments, the plaintiffs and appellants, by claiming in their petition an account of those emoluments received by the defendant have incurred the obligation of paying him a salary during the whole time of his ministry; that the appointment, by the bishop, of the defendant as curate, implied the assent of the congregation thereto; that catholics recognize no control, in spiritual matters, except that which proceeds from the head of the church, to wit, the pope, or his representative, the bishop, or the ministers appointed by the latter; and that if the powers of the church-wardens extend to the removal of incumbents, at their will and pleasure, either directly, or indirectly, by withholding from them the means of existence, or by preventing them from performing their religious duties in the parish church, the bishop's power in this particular must be at an end. The defendant invokes the canon law, as governing the relations which exist between him and his spiritual superiors.

The decision of this case does not require us to examine the relation between the appellee and his superiors in the church, further than to say, that the church-wardens are, in their corporate capacity, the legal owners of the property which the act of incorporation authorizes them to hold, to be used for the purposes

specified in the charter. They are the sole temporal administrators, and cannot be controlled, by the clergy, in their administration. They are responsible to the congregation only, who may choose others, if those in authority shall misuse or abuse the powers conferred by the legislature. Neither the pope, nor any bishop, has, within this state, any authority, except a spiritual one; and, as the courts of justice sit to enforce civil obligations only, they never attempt to coerce the performance of those of a spiritual character. We must content ourselves with considering the defendant in his civil relations to the plaintiffs. They do not deny that he was the curate of the parish, of which they are wardens; as such, they entered into a contract with him, soon after his arrival, in the year 1834, which appears to have been put an end to by mutual consent. This contract might entitle him, if he had chosen to remain in the parish, to the casual emoluments which parish priests are allowed, when no salary is agreed upon. That they must be satisfied with this, results from the testimony of the two dignified witnesses whom the defendant has introduced. Those emoluments have been fixed by a tariff made by the churchwardens. Those gentlemen, being desirous to provide for the support of a parish priest, as prescribed by the act of incorporation, were necessarily invested with the power of recurring for that purpose, to one of the two modes which the testimony informs us are customary in other parishes. It is difficult to conceive, how the power of fixing the quantum of the salary, can be distinguished from that of fixing the rate of the emoluments, which the parishioners are to pay for the services they require. The tariff of the bishop *may* be obligatory as a matter of conscience, but courts of justice cannot be resorted to, to coerce a compliance. It appears from the 8th decree of the first provincial council, held in Baltimore, in the year 1829, which has been given in evidence, that the right reverend members of that body, doubted whether the payment of the salary could be coerced in temporal courts; since they enjoined upon each bishop of the different dioceses of the United States, to interdict every church under their respective jurisdiction, whose wardens should attempt to retain the whole or a part of the usual salary of the curate. The courts of justice of a state, in which the people recognizes

no power of taxing them, in any branch of the government but that in which they are represented, cannot easily be persuaded to acknowledge the power of fixing sums to be drawn from the pockets of suitors, by the mandate of the pope, or of any bishop appointed by him. The counsel for the defendant has contended, that, as the plaintiffs claim, in their petition, an account of the casual emoluments received by the defendant, they are bound to pay him a salary during the whole time of his ministry, to wit, until he shall be recalled by his bishop. To this, the counsel for the plaintiffs has correctly answered, that the actual receipt of the casual emoluments, after the dissolution of the contract for a salary, bound him more strongly to remain satisfied with these emoluments, and was an implied renunciation of the salary. From the period when the salary ceased to be paid, until the 22d of May, 1841, the defendant was permitted to occupy the presbytery, although an act of assembly of the 24th of January, 1838, authorized the plaintiffs to deprive him of the use of the church property. The defendant does not appear to have considered himself bound to exercise his functions as he had previously done in the parish, after he ceased to receive the salary, for he indulged himself in several excursions to the parishes of Avayelles and West Feliciana, in which there were then no parish priests; being absent, at times, in his visits to the former parish for the space of six weeks—a length of absence absolutely inconsistent with the obligation of performing divine service twice a month, in the church at False River.

Our learned brother in the District Court, sustained the defendant's pretensions, observing, that "the treaty of cession guarantees to the inhabitants of Louisiana the unrestrained exercise of their religion, and recognizes the right to self-government in the Roman Catholic Church, as then known and established."

The treaty of cession, art. 3, provides that the inhabitants of the ceded territory, shall, as soon as possible, be admitted into the Union or Confederacy of the United States, and that, *in the mean time*, they shall be protected in their persons, property, and the free exercise of their religion. Since the 30th of April, 1812, the day on which Louisiana took her rank as an independent State among her sisters, that article of the treaty has ceased to have any

practical effect whatsoever, and has become obsolete. The promised protection was that of the Government of the United States, which abandoned the power by the erection of the territory into a State, fully able to afford to her citizens, and even to strangers within her jurisdiction, every needed protection. There is a decision of the Supreme Court of the United States to this effect.

The plaintiffs engaged to pay to the defendant, for his services as curate, a yearly salary of one thousand dollars, and at the end of about eighteen months, expressed their intention to cease to pay it. The defendant, on being informed of this, might have urged, that the second year having commenced, he was entitled to his salary until the end of it; this, however, he refrained from doing; and, on the contrary, declared his intention to depart as soon as he was paid. Admitting, therefore, the authority of the bishop to insist on his curate's remaining in the parish in which he had located him, notwithstanding the objections of the church-wardens to receive his services, and his want of inclination to render them, and a consequent obligation, on the part of the church-wardens, to continue to pay the salary, *maugre* this, during the pleasure of the bishop,—it is certainly a *non sequitur*, that the defendant could not fairly consent to accept the contingent fees for burials and funeral services, instead of the salary by which he was formerly remunerated.

It appears to us, that the District Judge erred. It is established that after the defendant received notice that the plaintiffs no longer intended to pay his salary, he declined the ordinary compliance with the duties for which the salary was a remuneration.

The counsel for the plaintiffs admits that the defendant is entitled to his salary for two years, to wit, from the 1st of April, 1834, to the 1st of April, 1836; and that he has, besides, a claim for expenditures amounting to a sum of \$850.44, composed of \$630, according to accounts numbered from 1 to 27, and of \$220.44, as shown by the accounts in bundle O. His other alleged disbursements are not supported by evidence. His salary, and an allowance for the washing of the church-linen, is admitted to be \$2090; which deducted from the sum of \$2389.68, which he acknowledges to have received, leaves a balance of \$309.68, to

be deducted from his expenditures; so that there is still due to him a sum of \$550 76.*

It is, therefore, ordered, that the judgment of the District Court be annulled and reversed; that the defendant have judgment in the main suit, and that he recover on his plea in reconvention the sum of five hundred and fifty dollars and seventy-six cents, with costs in the District Court; and that he pay those of appeal.

CELINA JOHNSON v. FREDERICK PILSTER.

Art. 2367 of the Civil Code, after providing a legal mortgage in favor of the wife on all the property of the husband, for the reimbursement of her paraphernal property, where the husband has received the price of it, declares that she shall have a similar mortgage in case he should have disposed of her paraphernal property, in any other way, for his individual interest. The words "*or otherwise disposed of the same*" in that article refer to the paraphernal property itself, and not to its proceeds. The wife has a legal mortgage, for the reimbursement of her paraphernal funds, if the husband applies them to his own use, from whatever source he may have received them.

The effect of the renunciation of the community of *acquêts* by a wife, is to place the husband and wife in the same situation as if no community had ever existed between them; and all property, purchased during the marriage, will be considered as having been made on the husband's account, as much so as if made before the marriage.

The wife's mortgage for the reimbursement of her paraphernal property, attaches as completely to property acquired by the husband, during coverture, as to that he possessed before; nor can it be inferred from the right given to him, as head of the community, to sell its effects without the consent of the wife, that, when he exercises that right, the property alienated is relieved from her mortgage. Like all other general mortgages, the wife's follows the property into the hands of the purchaser, but can only be enforced after discussing that remaining in the possession of the husband.

Art. 2367 of the Civil Code granting the wife a mortgage on all the property of her husband, for the reimbursement of her paraphernal property, where the amount has been received by the husband, or where it has been otherwise disposed of for his benefit, is not repealed by art. 3281 or 3317.

Prior laws are repealed by subsequent ones, only in case of positive enactment, or

* There seems to have been an error in the subtraction; the amount due would be \$540 76. R.

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clear repugnancy between their provisions. This rule established in relation to laws enacted at different periods, applies with greater force to the several parts of a code adopted about the same time.

The mortgage of the wife on the property of her husband for her dotal and paraphernal rights, exists without being recorded.

APPEAL from the District Court of the First District, *Buchanan, J.* This was an action by Celina Johnson, the wife, separated *a mensa et thoro*, of Henry A. Johnson, to enforce a legal mortgage for the restitution of paraphernal property, on a slave alienated by the latter a short time before the judgment of separation. The evidence established the marriage of the plaintiff; the separation from bed and board by a judgment of the proper tribunals; the amount originally due from the husband for her paraphernal property, and the balance still due after the sale of his property; the renunciation of the community by the wife; the sale of the slave, and the regular notice to the defendant. There was judgment below in favor of the defendant. The plaintiff has appealed.

C. Janin, for the appellant. This action is founded on arts. 2367, 3305, 3310 of the Civil Code. The judge below erred in supposing that the mortgage given by art. 2367 of the Civil Code is limited to cases in which the property has been alienated by the wife, and the proceeds have been received by the husband, or have been disposed of for his benefit. See *Eastin v. Eastin's Heirs*, 10 La. 197. *St. Martin v. His Creditors*, 15 Ib. 419. It specifies two cases in which the wife shall be entitled to a mortgage: the *first*, where the husband has received the price of paraphernal property alienated by the wife; the *second*, where he has otherwise disposed of such property for his individual interest. The error of the judge consisted in interpreting the words "or otherwise disposed of the same," in art. 2367, as having reference to "the amount of the paraphernal property alienated by the wife," and not to "the paraphernal property" itself, whether alienated by her or not. The interpretation of the court below, would render the words "or otherwise disposed of the same for his individual interest," nugatory. The construction for which the appellant contends is confirmed by the provisions of the same code, arts. 3305, 3310. Art. 2362 provides, that "the parapher-

nal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband." Art. 2367, provides that "should it be proved that the husband has received the amount of the paraphernal property alienated by his wife, or otherwise disposed of the same for his individual interest, the wife shall have a legal mortgage on all the property of her husband for the reimbursing of the same." And art. 3310 speaks of the general mortgage of the wife on all the immovables and slaves of the husband, "on account of the dower, *and other claims enjoying the same rights.*" The provisions of the Code of 1808, (art. 62, p. 335,) are similar to those of the present Code. By the laws of Spain the wife also held a mortgage for her paraphernal property. Febrero, liv. 1, tit. 2, chap. 6, No. 2. 4 Partida, loi 17, tit. 2. So among the Romans. Domat, l. 1, tit. 9, sect. 5, Nos. 5 & 6. Code, De Jure Dotium, loi. 29. Troplong, Privilèges et Hypoth. comm. sur l'art. 2121. So by the French Customary Law. Pothier, De la Puissance du Mari sur la personne et les biens de sa femme. No. 81. Ib. De L'Hypothèque, art. 3, chap. 1. Ib. De la communauté Nos. 610, 611, 763, 764, 765. And under the Code Napoléon, Rogron, art. 2135. Troplong, Des Priv. et Hypoth., comm. sur l'art. 2121.

The wife's mortgage secured by art. 2367, is not repealed, as intimated by the judge below, by arts. 3281 and 3317, any more than that of particular legatees, under art. 1627, or that of the lessor under art. 2762. See *Pain v. Perret*, 10 La. 303.

Preston, for the defendant. The property for which the plaintiff obtained judgment against her husband, was paraphernal or extra-dotal. Civil Code, art. 2360. She had a right to administer it herself. Ib. arts. 2361, 2367; and to sue for it during marriage. Ib. art. 2368. Dotal property is entirely different. Ib. arts. 2317 to 2320. She had a legal mortgage to secure her dotal property. Ib. arts. 2357, 3287. But neither of these articles gives her a legal mortgage to secure her extra-dotal property; and a mortgage can only exist when authorized by law. Ib. art. 3250. There is no other evidence that Johnson owned the slave, but the sale. Is this sufficient? If so, it can only prove that the slave belonged to the community of *acquêts* between himself and his wife. Ib. art. 2374. He was authorized, as head of the com-

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munity, to alienate the common property during the existence of the community, without the consent of the wife, and, of course, to alienate it free from any mortgage in her favor. Ib. art. 2373. The decisions of this court, heretofore made, were under arts. 61, 62, p. 334, of the Code of 1808, which have been changed by art. 2367 of the present Code. Under the latter it must be proved, that the husband alienated paraphernal property, and disposed of it for his individual interest, in order to give the wife a legal mortgage; and even then, the mortgage is on the husband's property, not on that of the community, alienated by him during its continuance.

L. Janin, in reply. The alienation by the husband is sufficient proof of the property in the slave. One who claims a mortgage on property sold by his debtor, is only bound to prove that the mortgage affected the property before it was sold by the debtor. The purchaser cannot contest the title of his vendor, without impugning his own. In the case of *Eastin v. Eastin's Heirs*, the court declared, that it would give effect to the wife's mortgage on property in the possession of the vendee of her husband. Community property, as well as that of the husband alone, is subject to the wife's mortgage. *Cassou v. Blanque*, 3 Mart. 390. See *The Planters Bank et al. v. Lanusse et al.* 12 Ib. 157, as to art. 90, p. 342 of the Code of 1808, re-enacted in art. 2404 of the present Code. By not accepting the community, within the delay fixed, the wife is presumed to have renounced it. Civil Code, art. 2389.

MORPHY, J. The petitioner, separated in bed and board from her husband, Henry A. Johnson, seeks to enforce her legal mortgage on a slave named Hannah, sold by him, and now in the possession of the defendant. The facts of the case, about which there is no dispute, are; that a few months after the marriage of the plaintiff, in August, 1832, her husband received from one Jacques Blanchard, a sum of three thousand dollars, due to her from the estate of her father, Pierre Allain, and for which her mother and tutrix, the wife of Blanchard, was accountable to her; that the three thousand dollars were paid in sugar and molasses delivered to Johnson, on which he realized a profit of seven hundred dollars, by selling those articles in Natchez; that, in

May, 1838, the plaintiff obtained, against her husband, a judgment of separation, liquidating her rights at \$3000, which judgment was partially satisfied by the seizure and sale of her husband's property, leaving yet due to her a balance of \$1690 70; and that prior to such judgment, to wit, on the 30th of November, 1837, Johnson had sold the slave in question to one Wagner, who afterwards sold her to the present defendant. There was a judgment below in favor of the latter, and the plaintiff has appealed.

The judge of the inferior court has given to article 2367 of the Civil Code a construction to which we cannot assent. The article reads thus: "The wife may alienate her paraphernal property with the authorization of her husband, or, in case of refusal or absence of the husband, with the authorization of the judge; but, should it be proved that the husband has received the amount of the paraphernal property thus alienated by his wife, or otherwise disposed of the same for his individual interest, the wife shall have a legal mortgage on all the property of her husband for the reimbursing of the same."

The judge below was of opinion that this article gives to the wife a legal mortgage only when there is a sale of her paraphernal property, and her husband receives the proceeds or disposes of such proceeds for his individual interest; but that for all sums of money or property received or used by him, where there has been no sale of her property, she has no legal mortgage on his property. The error committed by the judge in construing the article under consideration consists, we apprehend, in applying the second member of the sentence, "*or otherwise disposed of the same for his individual interest*" to the *proceeds* of the paraphernal property sold, while it relates, in our opinion, to the paraphernal property itself, where it is disposed of otherwise than by a sale. If the construction of the judge were correct, the second part of the provision would be mere surplusage, which might be left out without injury to the wife, as her mortgage attaches the moment her husband receives the proceeds of the property sold, and he cannot dispose of such proceeds without first receiving them directly or indirectly. From the words of the article, it is clear to our minds, that after providing in favor of

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the wife a legal mortgage for the more ordinary case in which her husband receives the price of her paraphernal property, the law intended to give her the same security in case the husband should dispose of her paraphernal property in any other way for his individual interest. This construction gives effect to every part of the article, and is more consonant to reason and justice, as we can see no good ground for the distinction made by the judge. From whatever source the husband receives the paraphernal funds of the wife, if he applies them to his own use, the law accords to her a legal mortgage for the reimbursement of the same. 4 La. 565. 10 La. 198, 303. 11 La. 280. 15 Ib. 420.

The appellee's counsel has contended, that the legal mortgage given by article 2367, exists only on the property of the husband, and not on that of the community; that as there is no evidence of title to the slave in Johnson, except that he sold her, such slave must be presumed to have belonged to the community; that the husband was by law authorized to alienate the common property, without the consent of the wife, and that, therefore, he sold the slave free from her mortgage. The question raised by this argument has nothing in it either new or embarrassing. When the wife renounces the community of gains and *acquêts* (and she is presumed to have renounced, when, after obtaining a separation from bed and board, she does not accept it within the delay fixed by law,) all purchases of property made during the marriage remain for the account of the husband alone, as much so as if he had made them before the marriage. The effect of the renunciation is to place the husband and wife in the situation they would be in, had no community ever existed between them. The wife's mortgage attaches, therefore, as completely to the property he acquires during coverture, as to that he possessed before. From the right given to the husband, as head of the community, to sell its effects, without the consent of the wife, it cannot be inferred that when he exercises that right, the property is relieved from her mortgage. If such were the case, the legal mortgage given to the wife would be nugatory. As we said in the case of *Cassou v. Blaque*, (3 Mart. 390,) "a lien to be extinguished by the alienation of the property, would be no lien at all." Like all other general mortgages, the wife's mortgage

follows the property in the hands of the purchasers, but can be enforced upon it only after discussing the property remaining in the possession of the husband. Civil Code, arts. 2379 to 2389. 12 Mart. 163. 7 Mart. N. S. 68. 10 La. 198. 2 Troplong, Priv. et Hypoth. No. 433, *ter.*

The District Judge has expressed a doubt whether article 2367, which accords a legal mortgage to the wife for her paraphernal property, is not itself repealed by articles 3281 and 3317. There is, in our opinion, no room for such a doubt. It is true that article 3281 provides, that the rights and credits for which a legal mortgage is given are those enumerated in the following articles, and that among them is not to be found the claim of the wife for her paraphernal effects; but article 3280, immediately preceding, provides, that no legal mortgage shall exist, except in the cases determined by the Code, thus embracing and acknowledging all mortgages to be found in every part of it. From this latter provision it is clear that mortgages, expressly given in other parts of the Code, are not to be considered as repealed, because they happen to be left out of the enumeration made immediately after, and which is not in restrictive terms. The wife's mortgage for her paraphernal property is not the only one omitted; there are other legal mortgages which have not been mentioned. Civil Code, arts. 1627, 2762. Prior laws are not repealed by subsequent ones, unless by positive enactment, or a clear repugnancy in their respective provisions. If such be the rule in relation to laws enacted at different periods, it applies with greater force to the several parts of a Code adopted about the same time. As to the other article, 3317, quoted by the judge, it only prescribes, as a general rule, that all mortgages, conventional, legal, and judicial, shall be recorded. Other provisions impose on the husband the duty of having the wife's mortgage recorded, and impose penalties for his neglect to do so; but whether this duty be complied with or not, the legal mortgage exists in favor of the wife. Civil Code, art. 3298. In the case of *Pain v. Perret*, 10 La. 300, this court held that the rights of the wife, relating to her dotal and paraphernal property stand on the same footing, as regards the recording of the evidence of them.

It is, therefore, ordered, that the judgment of the District Court

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be reversed, and that the negro slave, Hannah, be seized and sold to satisfy the judgment obtained by the appellant against her husband; and that the appellee pay the costs in both courts.

WILLIAM FLOWER and another v. OLIVER DUBOIS and another.

A statement in the protest of a notary, that a demand of payment had been made of the maker of a note, and payment refused, is sufficient proof of an amicable demand.

APPEAL from the City Court of New Orleans, *Cooley, J.*

Wray, for the plaintiffs.

Conklin, for the appellants.

GARLAND, J. This is an action on a promissory note, to which the defendants answered by a general denial, and by pleading the want of amicable demand. The inferior court considered the signature to the note as admitted, there being no special disavowal of it, and that the amicable demand was proved. Judgment was, therefore, given for the plaintiffs, from which the defendants have appealed.

When the case was first before us, we were under the impression that no amicable demand had been proved, and condemned the plaintiffs to pay the costs. Upon a re-examination of the record,* we find a protest, made by a notary, in which it is stated, that a demand had been made on one of the defendants in person, and that payment had been refused. On several occasions we have held this to be sufficient proof of an amicable demand. 15 La. 495. 19 Ib. 461.

Judgment affirmed.

* This case was decided on a re-hearing.

Kittridge v. Breaud.

EBENEZER EATON KITTRIDGE v. GODFROI BREAUD.

Decision in the case of *Kittridge v. Breaud*, 2 Robinson, 40, affirmed.

It is not necessary to the validity of a purchase of public lands from the government of the United States, under the laws relating to back-lands, that the lands purchased should be described by the township, range, and section.

The title of a purchaser from the United States of a portion of the public domain, will not be affected by the omission of the Register of the Land Office to mark the sale on the township plat in his office, or by a subsequent sale of the same lands, through error, to another.

Where one entitled by law to a preference in the purchase of a particular piece of the public lands of the United States, in the exercise of his right, pays the price and receives from the proper officer a receipt for the same, with a certificate that he is entitled to purchase the land, the sale will be complete, though the evidence of it may not have been made out in the prescribed form.

The act of Congress of 5th May, 1830, authorizing the Registers of the Land Offices in Louisiana to receive entries of lands in certain cases, was passed for the relief of a class of persons who had paid to a Receiver the price of the lands they intended to purchase, but had not presented their receipts to the Register for his certificate, until too late to exercise their rights. It is inapplicable to cases where the application to purchase had been made to the Register, who admitted the applicant's right.

In a contest between parties claiming lands sold by the United States, the courts of this state, whose powers are not limited by any distinction between law and equity, will look to the facts of the case, and do justice between the parties, though a patent may have been issued to one of them. The principle is well settled in the jurisprudence of this State, and in that of the courts of the United States, that an equitable right, originating before the date of the patent, whether founded on an earlier entry or otherwise, may be inquired into.

The acts of Congress conferring pre-emption rights on the settlers on the public lands, vest a legal title in the purchaser as soon as the purchase is made and the price paid; and the United States cannot take back the land nor sell it to another.

A sale of a portion of the public lands of the United States, made in pursuance of an act of Congress conferring authority for that purpose on the Register and Receiver of Public Moneys, will divest the government of its title.

One who obtains a patent from the United States for a portion of the public lands, by suppressing a part of the facts of the case, will not be permitted to benefit himself thereby. The patent will enure to the benefit of the party entitled to recover the land.

APPEAL from the District Court of Assumption, *Nicholls, J.*

Connely and Ilsley, for the appellant.

M. Taylor, for the defendant.

GARLAND, J. This case was before us at the last April term,

and was remanded for a new trial. 2 Robinson, 40. The pleadings and facts are fully stated in the opinion then delivered. When the cause was returned to the District Court, the defendant filed a supplemental answer, stating that since the trial in this court, he had obtained from the United States a patent for the land in controversy, whereby the absolute title to it is now vested in him; he, therefore, prays for a judgment in his favor. André Le Blanc and his wife, who were the vendors of the plaintiff, also came in, and filed an answer, denying that they were in any manner responsible to him, and asking that the demand made on them, under article 2495 of the Civil Code, may be dismissed. The question of damages on the part of the plaintiff, and that for the value of improvements on the part of the defendant, were by consent reserved for future decision, and the case was tried on the question of title alone. No new evidence except the patent, was offered. The jury found a verdict for the defendant, and the plaintiff has again appealed.

The counsel for the defendant has occupied himself principally in combating the opinions expressed when this case was first before us. He still urges that there never was any delivery of the land to Le Blanc, or any taking possession of it by him. What acts will constitute a delivery and taking possession of property, we cannot imagine, if those of Le Blanc do not. In May, 1822, he presents himself to the Register and Receiver at New Orleans, and claims the right of purchasing a certain quantity of land, under a particular act of Congress; the right is conceded and he pays his money, and obtains the evidence of it. With this in his possession, he goes to a surveyor acting in conformity to law, who, in May, 1823, makes an actual survey of the quantity of land purchased, establishes the boundaries, marks the corners, and returns a plat and *procès-verbal* of his proceedings into the surveyor-general's office, by whom it is approved. Ascertaining then, that he had not entered all the land he was entitled to purchase, two days afterwards, to wit: on the 15th of May, 1823, the same surveyor, at the request of Le Blanc, surveyed and marked off the quantity of land claimed, and also returns a plat and *procès-verbal* of this operation to the same office, which is also approved. With this, Le Blanc again presents himself to the Register and Re-

ceiver, and, in writing, makes application to purchase the land. The register makes an endorsement on the application, that it appears from the records in his office that Le Blanc is entitled to purchase the land, the money is paid, and again the evidence of payment furnished. After the two surveys were made, Le Blanc again makes application to the surveying department, to survey and mark off his land, upon which demand no action was had until 1829, when a general survey of the township was made and the quantity purchased at one time set apart and represented on the plat, and the other omitted. The defendant did not settle on the land for several years afterwards, and now claims the benefit of this omission of the surveyor. A statement of the facts seems to us sufficient to prove a complete delivery, and taking possession of the land in controversy.

Upon the third point raised by the defendant, we are of opinion that it is not indispensably necessary in the purchase of land from the government, under the laws relating to back-lands, that they should be described particularly by the township, range, and section. On the contrary, we know that, in many instances the land has not been surveyed at all, yet the money has been paid and the sale perfected, although the evidence of the fact cannot be made out with the precision required by law. We do not think that a purchaser of a portion of the public domain should lose his right to it, because the Register of the land office fails to mark on the township plat in his office, that the land has been sold, and afterwards sells it to another.

The counsel for the defendant contends, that the fact of paying into the land office the price of a particular double concession, does not make the person paying the owner. This is true, if the party paying had no particular authority or right to pay; but, we think, when the law gives an individual a preference in the purchase of a particular piece of land, and, in the exercise of his right, he pays the money, and receives from the public officer a receipt for it, and a certificate that he is entitled to purchase, the sale is complete, although the evidence of it cannot be made out in a prescribed form.

The act of Congress of May 5th, 1830, (2 Land Laws, 252,) does not apply to a case like the present. That act was passed

for the relief of a class of persons, who had paid their money to the Receiver, and had not presented their receipts to the Register for his certificate, until it was too late for them to exercise their rights, but, in this case, the application to purchase was made to the Register in the first instance, who admitted the applicant's right, and the Receiver then gave his receipt. The circumstances that led to the adoption, by Congress, of the law in question, are well known to one of the members of this court, and a class of cases very different from the present was intended to be protected.

The counsel for the defendant contends, that his client had no notice of the purchase by Le Blanc, and that he ought not to suffer, as he was guilty of no *laches*, and did not know of the purchase in 1824, by the former. Independent of the evidence that existed in the offices of the Register and Receiver in New Orleans, and of the Surveyor General in the vicinity of the land, it is in evidence, that the boundary posts placed by Bonnet, the surveyor, in 1823, as it is supposed, are still to be seen, and show that the land in dispute is included in the limits of Le Blanc's tract. The evidence does not show any negligence on the part of the vendors of the plaintiff, and, as we still adhere to the opinion that it is not necessary to record in the Parish Judge's office, the sales or certificates of purchases of land from the United States, the diligence seems to have been sufficient; and the defendant cannot avail himself of the omission of the surveyors to represent the land on the township plat. Le Blanc, in 1824, requested it should be surveyed and represented, and why it was not done is not explained.

The last point in the case is, whether a patent given by the United States to the defendant is conclusive, as he alleges, upon the rights of the parties. We are aware that it has been decided, that the patent is the superior and conclusive evidence of legal title; until it has been issued the fee is in the government, which, by the patent, passes to the grantee. 13 Peters, 450. 516. This is technically true, and if there were a distinction between the law and equity powers of our courts, as there is in those of the United States, it is probable that we should, if sitting on the law side, be compelled to give effect to the patent. But we are not

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bound by such rigid rules, and as our administration of the law is to be tempered by equity, we feel authorized to look to the facts of the case, and to do justice between the parties.

In 3 La. 62, this court said, that the acts of Congress which conferred on settlers on the public lands pre-emption rights, vested a legal title in the buyer, as soon as the purchase was made and the money paid, and that the government cannot take the land from them, and sell it to another. In 11 La. 90. 323, it was held, that a sale, without a patent, is evidence of title out of the government. It is divested by a sale, made in pursuance of an act of Congress, conferring authority on the Register and Receiver. Upon the same point, see 10 La. 155 ; 1 Robinson, 430. And the principle is well recognized in our jurisprudence, as well as in that of the courts of the United States, that where an equitable right, which originated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined into. 15 Peters, 93. 7 Wheaton, 149.

The patent, in this case, bears date August 31st, 1842, since the period when this case was last before us, and the judgment in favor of the defendant reversed. He, therefore, knew of the existence of the claim of the plaintiff, and must have concealed it from the knowledge of the Commissioner of the General Land Office and the President, otherwise a patent would not have been issued. We will not permit a party to benefit himself by suppressing a portion of the facts when he applies for a patent, when they are within his knowledge. The benefit of the patent must enure to the plaintiff, who is, in our judgment, entitled to recover the land.

The judgment of the District Court is therefore annulled and reversed, the verdict set aside, and it is ordered and decreed, that the plaintiff recover of the defendant the quantity of land mentioned in the petition and therein described, with costs in both courts, up to the time of this judgment becoming final and being recorded below, and in relation to the claim for damages and the value of improvements, which has been reserved, it is ordered, that the cause be remanded to the District Court to be proceeded on according to law.

The State v. The Judge of the Court of Probates of New Orleans.

THE STATE v. THE JUDGE OF THE COURT OF PROBATES OF
NEW ORLEANS.

Decision in the case of *The State v. The Judge of the Court of Probates of New Orleans*, 2 Robinson, 418, affirmed.

This was a rule on the Judge of the Court of Probates of New Orleans, *Bermudez, J.*, to show cause why a mandamus should not be issued, commanding him to grant an order convening a family meeting.

BULLARD, J. Ducongé, the second husband of Madame Duclosel, and co-tutor of her minor child, having applied to the Court of Probates of the city and parish of New Orleans, within whose jurisdiction he is domiciled, to convoke a family meeting for the purpose of considering whether he might be permitted to substitute a special mortgage in lieu of the general legal one resulting from his tutorship, in pursuance of the provisions of the act of 1830, the judge refused to take cognizance of the application, and in answer to a rule to show cause why a peremptory mandamus should not be issued, reiterates the reasons urged on former similar occasions, and particularly in the matter of the minor, *Fusilier*. He further adds, that the petition does not set forth the description of the property proposed to be mortgaged, nor refer to the title. This last objection goes to the merits of the application. Upon the question of jurisdiction, the opinion of this court remains unchanged.

The rule is, therefore, made absolute.

Pecquet, for the mandamus.

THE STATE v. THE JUDGE OF THE PARISH COURT OF NEW ORLEANS.

By article 567 of the Code of Practice, a party against whom a judgment has been rendered cannot appeal, if he have acquiesced therein, by voluntarily executing it; and the same rule will be extended to one, who, having obtained a judgment, has carried it into execution.

A rule on the mortgagee, taken, after an order of seizure and sale had been executed, by one who had been appointed curator *ad hoc* to represent the third possessor of the mortgaged property, to show cause why a certain sum, under the jurisdiction of the Supreme Court, should not be allowed as a fee for his services, is not such an incident to the principal action, as to make the latter the basis of an appeal, to be used only for the correction of errors committed in the adjustment of such incidental matters. Though arising out of the original action, the demand in the rule is entirely distinct from it, and, being under three hundred dollars, is not appealable.

RULE to show cause why a mandamus should not be issued to the judge of the Parish Court of New Orleans.

Bodin, for the mandamus.

Maurian, Judge of the Parish Court of New Orleans, showed cause.

SIMON, J. Certain proceedings having been instituted by L. B. Macarty, to obtain the seizure and sale of property specially hypothecated to secure a note of seven thousand dollars, due him by one Scates, which property had been conveyed by a deed of sale to J. A. Spalding, who, in the said deed, had assumed the reversion of the mortgage; it became necessary to appoint a curator *ad hoc* to represent Spalding, who is an absentee. Langdon Elwyn, Esq., an attorney at law, was appointed to represent him, and such proceedings were subsequently had, contradictorily with him, as were necessary to execute the order of seizure and sale which had been granted, and to foreclose the mortgage. The property was sold, and the proceeds not amounting to a sum sufficient to satisfy the mortgage claim, were paid over to the seizing creditor; that is to say, the property seized was purchased by Macarty, the plaintiff.

After the proceedings had thus been completed, and the mortgage foreclosed in compliance with the order or judgment of the court, Elwyn took a rule on the creditor to show cause why a

certain fee should not be allowed him, as part of the costs of the suit, to be paid by the plaintiff in the executory process. This was objected to by the plaintiff, but the rule was made absolute, and the sum of two hundred and fifty dollars was allowed by the Parish Court, as a fee to the curator *ad hoc*, to be taxed among the costs of the suit.

The seizing creditor being dissatisfied with the judgment rendered on the rule, presented a petition of appeal to the judge of the Parish Court, who refused to grant it; and the object of the present application is to obtain from this court a writ of mandamus to compel the inferior judge to grant the appeal applied for.

The Parish Judge has shown for cause: that the ground upon which the plaintiff seems to rely is, that the order or judgment rendered on the rule being an incident to the principal judgment, and a part of the matter in dispute, he is entitled to an appeal: that if so, the appeal intended to be taken would be of the whole case, which the applicant cannot be permitted to do, under article 567 of the Code of Practice, which provides that the party against whom judgment has been rendered cannot appeal, if he has acquiesced in the same, by executing it voluntarily. He contends that, *a fortiori*, he who has had a judgment in his favor, and who has executed it, must be precluded from appealing.

He further maintains that the appeal, if not prayed for on the whole case, must be on the interlocutory judgment on the rule, which can only be considered as a new and separate suit brought by Elwyn against the plaintiff; and that, the amount claimed being under three hundred dollars, no appeal can be allowed.

Various matters have been alleged in the petition of the applicant and in the answer of the judge, and divers depositions of witnesses have even been brought up to show the circumstances under which the appointment of the curator *ad hoc* was made, and to contest or justify the propriety and legitimacy of the curator's claim to a fee of two hundred and fifty dollars. But, as the naked question which we have now to examine relates exclusively to the applicant's right of appeal, we shall consider it without any reference to the statements and evidence of the facts, which the parties before us have thought proper to allege in, or annex to their pleadings.

The view taken by the Parish Judge appears to us to be correct. We agree with him that, as, under article 567 of the Code of Practice, a party against whom a judgment has been rendered, cannot appeal from it, if he has acquiesced therein, by executing it voluntarily; the same rule should exist, *a fortiori*, with regard to a party who has obtained a judgment, and who has had it carried into execution. The latter case, if brought before us, would either present no object in controversy upon which our interference would be claimed or could be exercised, or would offer the novel and extraordinary anomaly of a party's complaining of a judgment in which he has acquiesced, and from the execution of which he has derived all the benefit which, according to his demand, he was really entitled to. The original controversy was at an end by the foreclosing of the mortgage. Nothing could revive it, and we cannot acquiesce in the proposition, that any subsequent subject in dispute arising out of it, should be considered as such an incident to the principal action, as to make it the basis of an appeal, to be used only for the purpose of correcting errors committed in the adjustment of such subsequent incidental matters. We think, therefore, that the Parish Judge did not err in refusing to grant the appeal, if intended to bring the original case before this court.

Considering the judgment complained of, as the result of a new and separate suit, brought by the curator *ad hoc* against Macarty, and as a demand entirely distinct from the original action, though it arises out of it, the applicant is not entitled to an appeal, as the amount in controversy does not exceed three hundred dollars. Code of Practice, art. 570.

It has been urged, however, that the sum allowed to the curator *ad hoc* has been ordered to be taxed among the costs of the suit, and that the general rule is, that costs must follow the judgment; that, therefore, those costs should be considered as being a part of the original judgment, subject to be brought by appeal before us, although the costs should be the sole matter in dispute before the appellate court; and we have been referred to two cases, reported in 10 Mart. 115, and 11 Mart. 577, in which it was held, that "costs are incidental and accessory to the judgment of the court." This doctrine is perfectly clear and cannot

be controverted; and had the original judgment been appealable from, the question relative to the sum in dispute, as a part of the taxed costs, might perhaps have been inquired into on the appeal; but, as we have already said, the principal judgment cannot now be appealed from, and we are not prepared to say that an incidental or interlocutory judgment, on a mere question of costs, can be examined on appeal before this court, without its being brought up with the whole case.

Rule discharged.

JOHN K. WEST v. HIS CREDITORS.

Decision in the case of *Fisher and another v. Vose*, 3 Robinson, 457, affirmed.

An application, under the act of Congress of 19th August, 1841, to be declared a bankrupt, made by the insolvent, will have the effect of arresting all proceedings against him, until a decree is rendered by the court sitting in bankruptcy.

One who has applied to be declared a bankrupt, under the act of Congress of 19th of August, 1841, must remain in that situation until he is so declared, or his application is rejected. He has no right to dispose of his property, in any way, while such application is pending. He is bound to preserve it for the common benefit of all his creditors, and may exercise such power over it as may be necessary for that purpose. In a case of involuntary bankruptcy the rule may be different.

Plaintiff having made a surrender of his property under the insolvent laws of the State, subsequently applied to the District Court of the United States to be declared a bankrupt under the act of Congress of 1841. Previous to the latter application, his wife, who had obtained a judgment against him, had levied a *f. fs.* on a claim belonging to the insolvent, alleged to have formed a part of the property given up to his creditors, at the time of his surrender under the insolvent laws of the State. The syndic appointed under the State laws, having taken a rule upon plaintiff to show cause why he should not deliver to him the certificate of the claim, and neither the assignee under the act of Congress, nor the wife of the insolvent having been made parties: *Held*, that the case must be remanded that the question which of the creditors are entitled to claim, may be decided contradictorily with the assignee, and the wife.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. In the year 1819, West presented a petition to the District Court of the First District, accompanied by a state-

ment of his debts, and a schedule of his property, asking for a meeting of his creditors, and that a respite might be accorded to him. His prayer was granted. He managed his own affairs until the 16th February, 1821, when Lloyd and Harrison and other creditors, presented their petition, alleging that West had not complied with the terms of the respite, and that he would not do it, as he was hopelessly insolvent; wherefore they prayed that he might be compelled to make an actual surrender of his property. This prayer was granted, a meeting of the creditors was held, and Samuel B. Bennett appointed syndic, who took upon himself the administration of the estate.

Among the property which West is said to have possessed at this time, was a large claim upon the Mexican Government, for money advanced, supplies and munitions of different kinds furnished, of which nothing is said on his *bilan* or schedule; but the syndic and the creditors seem to have known of its existence, and to have used various efforts to collect its amount, without success. This claim was finally presented to the Board of Commissioners, which recently sat in the city of Washington, under the provisions of a treaty with Mexico, and a large amount was awarded in the names of Louisa Livingston, executrix of Edward Livingston, deceased, and J. K. West. In the year 1842, a certificate for the sum of \$39,286 86, with interest, was delivered by the Secretary of the Treasury to West, who, sometime after, gave it up to the sheriff of the parish of Jefferson, to be sold under an execution issued at the suit of his wife against him.

Bennett, the syndic appointed by the creditors, being informed of this proceeding, on the 11th of November, 1842, took a rule on West to show cause, in four days, why he (West) should not be compelled to deliver up all the property he had surrendered to his creditors, and particularly the certificate above mentioned, and the sheriff of the parish was commanded to bring the certificate into court, which he did.

To this rule, West answered:

First. That Bennett is not the syndic of the creditors.

Second. That if he ever were named syndic, he has never accepted the appointment; that if he ever accepted it, he has not acted for more than twenty years, and has entirely neglected his

duty, whereby he has forfeited the office, and all the rights he now seeks.

Third. That the capacity of syndic is lost by non-user.

Fourth. That the claim is prescribed.

Fifth. That he denies having any such certificate in his possession.

Sixth. That he has become a bankrupt; that proceedings are pending in conformity to the act of Congress in the District Court of the United States; and that the aforesaid certificate has been surrendered for the use of all his creditors, wherefore Bennett has no right to claim it.

Seventh. That the syndic has no right to proceed against him in this summary manner; but if he has any rights, that they should be asserted contradictorily with the assignee and the other creditors, who have obtained a vested right in the certificate.

Upon this rule and the foregoing exceptions, the parties went to trial. A variety of testimony was introduced, and bills of exception taken, and a judgment was rendered making the rule absolute, and ordering West to deliver to Bennett the property set forth in his schedule, and particularly the certificate, received by him, of the recognition of his claims upon the Mexican Government, as having been surrendered to his creditors. From this judgment, West has appealed.

At the moment when the judge was about to sign his judgment, and after the expiration of three judicial days from the time it was pronounced, E. A. Bradford, Esq. presented himself and stated to the court that he had been appointed assignee of West by the District Court of the United States, in which tribunal West had been declared a bankrupt; and he exhibited a certificate of the fact, from the records thereof, and moved the court for a rule on Bennett, the syndic, to show cause why the judgment should not be set aside, and a new trial granted, on the ground that the judgment was contrary to law and evidence; that at the time it was rendered, there were no proper parties before the court; and that after his appointment as assignee, all further proceedings on the rule should have been arrested. The decree of bankruptcy is dated on the 5th of December, 1842, and the judgment on the rule was signed on the 14th of the same month. This applica-

tion was rejected by the judge as too late, and on the further ground that the assignee did not represent West for any of the purposes mentioned in the rule. To this opinion, Bradford took a bill of exceptions, and from the refusal of the judge to accede to his motion, he has appealed.

In consequence of the view we have taken of the sixth exception, we will not at present decide upon the five which precede it. It may become necessary for us to express an opinion upon them, should the case come before us again.

We are of opinion that the judge erred in overruling the sixth exception, and in proceeding to try the cause. The record shows that on the 8th of November, 1842, West filed his petition to be declared a bankrupt, in the District Court of the United States. On the schedule presented by him, the certificate in controversy is placed as forming a portion of the assets surrendered. The rule taken by the syndic was asked for three days after the filing of the proceedings in bankruptcy, and the judge of the inferior court had the evidence of the fact before him. The time fixed by the United States Court, for hearing the application of West was not distant, and the record shows that the decree of bankruptcy was obtained and the assignee appointed, before the District Judge had disposed of the rule. The judge ought to have suspended any action upon the rule before him, until the result of the case in the District Court of the United States was ascertained, and a legal representative of the creditors called into that tribunal appointed, and their interests represented.

This case presents, in a strong point of view, the difficulties and collisions that will arise between the State and United States tribunals, if it be permitted to suitors to pursue their rights in the former, whilst their debtor is suing them for a discharge in the latter. As before stated, nothing appears on record in relation to this claim on the Mexican Government, in the suits for the respite in 1819, and for the forced surrender in 1821, whilst in the application to become a bankrupt, it is formally surrendered; yet we see one of our courts proceeding by a summary trial and process to compel the bankrupt to deliver up to the syndic, a piece of property, or evidence of debt, which he had offered to surrender to other creditors, and giving a judgment affecting the interest of

those creditors, without giving them an opportunity of being heard.

Upon a full reconsideration of the principles laid down in the case of *Fisher and another v. Vose*, 3 Robinson, 457, decided in January last, we are satisfied of their correctness. That opinion is in accordance with that of one among the ablest of the judges of the Supreme Court of the United States, (Judge Story,) and with that of the Supreme Court itself. See the case of *Hunter v. The United States*, 5 Peters, 173. Judge McLean, in delivering the opinion of the court says: "until the court, in the exercise of their judgment, determine that the applicant is entitled to the benefit of the law, and in pursuance of its requisitions he assigns his property, the proceedings are inchoate and do not relieve the party. It is the transfer which vests in the assignee the property of the insolvent, for the benefit of his creditors. If before the judgment of the court, the petitioner fail to prosecute his petition or discontinue it, his property and person are liable to execution, the same as though he had not applied for the benefit of the law; and if after the judgment of the court, he fail to assign his property, it will be liable to be taken by his creditors on execution.

"The property placed upon the inventory of an insolvent may be protected from execution while he prosecutes his petition, but this cannot exclude the claim of a creditor who obtains a judgment, before the assignment." These remarks it is true, were not made in a case arising under the bankrupt law; but in one, under the statute of a state relative to insolvency, similar in many respects to the voluntary bankrupt act. The high tribunal which gave this opinion, thought that a priority obtained by a judgment, rendered previous to the assignment and the proceedings in insolvency, was not excluded or lost by them, but that during the prosecution of the application, the property might be protected from execution.

In the case of *Sturges v. Crowninshield*, 4 Wheaton, 122, the Supreme Court says that the line of partition between bankrupt and insolvent laws, is not so distinctly marked, as to enable any person to say with positive precision, what belongs exclusively to the one, or to the other class. A bankrupt law may contain the regulations which are generally found in insolvent

laws; and an insolvent law may contain those which are common to a bankrupt law. If that court found it so difficult to distinguish between the provisions of an insolvent law, and those of the bankrupt acts they then had allusion to, we think it would be much more difficult for the learned judges who compose that court, to draw a distinction between a voluntary bankrupt act and an insolvent law of one of the States. If it be true, that there is so little difference between the two kinds of laws, then the principles advanced in the case in 5 Peters, 173, are as applicable to the one as to the other.

It has been urged in this court that, after an application has been made to be declared a bankrupt, suits may be brought, judgments obtained, and executions issued in the same manner as if no proceedings were pending, and that no step can be taken to arrest such a course, until a decree is rendered and an assignee appointed. Whether this might not be so, in a case of involuntary bankruptcy, it is not necessary now to decide; but where the bankruptcy is admitted by the party, and all he seeks is a discharge, it would be at war with every principle of uniformity and equality among creditors to permit such a course, and thus allow the property to be scattered over the whole country, and sacrificed at forced sales, with no other purpose or effect, than to accumulate costs, and to give preferences to those creditors, whose claims might be favored by the bankrupt, or be forced by extra vigilance to a judgment and execution. The court, while sitting in bankruptcy, is one of equity, and should see all the creditors alike protected, and the property surrendered for their benefit preserved. It seems to us that ample power is given to the tribunals of the United States, to make use of all conservatory means to protect both creditors and debtors, by the 6th section of the bankrupt law of 1841, and the general powers conferred on the courts by the acts of Congress of 1789 and 1793, (2 Laws U. S. p. 64, sec. 14, and p. 357, sec. 7,) and by other provisions made by Congress.

We cannot, in a case of voluntary bankruptcy, give our assent to the argument advanced in this court, that the bankrupt, after he files his application for a discharge, still retains, up to the date of the decree, the full dominion over, and right to dispose of his

property as he pleases. His title, to be sure, is not absolutely divested, but the creditors from the moment of filing the petition have an interest in the property, and the debtor is according to the first section of the bankrupt act, deemed a bankrupt within the purview of it, and must stand in that situation until he is so declared, or his application is rejected. We do not believe an applicant for the benefit of the bankrupt law has a right to dispose in any manner of his property, pending his application. He is bound to keep it, as the common pledge of all his creditors, and for that purpose may exercise such legal dominion and rights as will enable him to do so. In a case of involuntary bankruptcy the rule may be different, because the fact is not admitted, and the act causing the party to be declared a bankrupt has to be ascertained and decreed. It would, therefore, be unjust, in a case where the bankruptcy is denied, and is the subject of judicial investigation, to deprive a party of the control of his property upon the mere accusation; yet cases are not wanting in the English books, from whence most of our ideas in relation to this branch of jurisprudence seem to be drawn, in which it has been done on sufficient cause being shown. It would not be difficult to imagine a case, where, if an application should be made by a creditor to have his debtor declared a bankrupt, the court would be fully authorized and justified in having the property secured, so that the creditors might have the benefit of it, in case a decree should be entered in favor of the petitioner; otherwise the creditors might be seriously injured, or, if the court be powerless, their rights might be entirely lost.

At the time when the rule was taken by the syndic, it appears that the certificate in controversy was in the hands of the sheriff of the parish of Jefferson, having been seized under an execution against West. The plaintiff in that execution was not made a party to the rule, and no other order was made on the sheriff than to produce the certificate. The creditors who were parties to the application for bankruptcy, have had no opportunity of asserting any rights they may have, and West was clearly not competent to represent them, after he had been declared a bankrupt, and an assignee had been appointed. For the purpose of having the question—which class of creditors is entitled to the benefit of the

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certificate in controversy, finally settled, we think the cause should be remanded, that the assignee may become a party and the case be tried between them. It would also appear just, that West's wife, who has had an execution levied on the certificate, should be made a party, so that the claims of all concerned may be examined and decided on.

The judgment of the District Court is, therefore, annulled and reversed, and the cause remanded for a new trial, with directions to permit E. A. Bradford to become a party to the rule, and to proceed to the trial of the case in the manner directed by law; the appellee, in his capacity of syndic, paying the costs of the appeal.

L. C. Duncan, and A. Hennen, for the syndic.

Grymes, for the appellants.

SAMUEL A. LARD v. REUBEN M. STROTHER and Wife.

In a question as to the sufficiency of the surety on an attachment bond, his actual means, and not the amount for which, from the nature of the case, he may be ultimately liable, must be looked to. C. C. 3011, 3012, 3033.

The fact of being a creditor of a party to a suit, does not disqualify a witness from testifying on his behalf.

Secondary evidence will only be admitted, where the absence of better has been sufficiently accounted for.

Defendants having obtained an order of seizure and sale on a judgment rendered in another State, plaintiff became the purchaser of his own property at a twelve months' credit, for the price of which he gave a bond in conformity to law. Previous to its becoming due, he obtained an injunction to prevent defendants from issuing any execution on it, and procured the appointment of a curator *ad hoc* to represent the defendants, who resided in another State. A commission to take testimony having been taken out by plaintiff, he caused the interrogatories to be served on the curator *ad hoc*. On an objection to the admission of the depositions: *Held*, that defendants having an attorney of record in the proceedings to obtain the order of seizure and sale, the case was not one for the appointment of a curator *ad hoc*; and that the interrogatories, not having been served on the defendants, or their counsel, were inadmissible.

APPEAL from the District Court of Pointe Coupée, *Nicholls, J.*

GARLAND, J. In the spring of 1840, Ann Strother, representing herself as the widow and executrix of the late Halsey Townsend, of Mississippi, authorized and assisted by her husband, R. M. Strother, presented a petition to the Judge of the District Court of Pointe Coupée, in which she represented, that in the year 1835, she had recovered two judgments against the plaintiff Lard, one in her own right, and the other as executrix of her late husband. The first for \$2005 25, with eight per cent interest from March 20th, 1835, until paid, and costs; and the second, for \$1102, with like interest from the same date, and costs. On the 26th of April, 1838, a credit was entered, which reduced the amount due on the two judgments, not including costs, to the sum of \$2444, which she claims, with eight per cent interest from the last date. With this petition two judgments were presented, rendered in the State of Mississippi, which were prayed to be made executory, and an order of seizure and sale was issued in conformity to law. Under this writ, a tract of land, and several slaves, were seized and offered for sale for cash, by the sheriff, but as two-thirds of the appraisement were not bid, the property, by consent of the parties, was immediately offered on twelve months credit, and purchased by Lard, who gave his bond to Strother alone, with security for the full amount claimed of him, with interest and costs.

A few days before the bond given by Lard became due, he commenced this suit, for the purpose of attaching the debt owing by himself, and arresting, by injunction, the execution about to be issued on the bond. He represents, that Strother, and his wife, in her own right as legatee, and as executrix of Halsey Townsend, deceased, are indebted to him \$12,000, with eight per cent interest, from November, 1838, until paid. He states, that previous to the death of Townsend, they were in partnership, (for a purpose not explained); that their accounts were in the course of settlement when the latter died; that after his decease, he (plaintiff) and Townsend's widow appointed arbitrators to make a final settlement of all demands and accounts, including the notes on which the judgments were obtained. He avers, that the arbitrators met and made an award; that Townsend's wife said at the time that she had lost or mislaid the notes afterwards

sued on, but promised to deliver them ; that by this award, he (Lard) became indebted to Ann Townsend, (the widow,) \$1850 to secure the payment of which he executed in her favor, in May, 1834, a mortgage on his interest in the Natchez or Lard's Rail Road, in the city of Natchez ; but that she, in violation of her promise, brought suit on the notes, and obtained judgments, though he had furnished his counsel with the means of defence, which means his counsel, in consequence of fraud and collusion with Ann Townsend, failed to use ; wherefore he alleges, that the judgments are null and void. He states, that all his documents and papers are withheld by his counsel, who pretends that they are lost or mislaid. He further alleges, that subsequent to the award and judgments, Ann Townsend married Strother in the State of Mississippi, whereby the latter has become entitled to all her personal rights, property, and actions, in virtue of which, he states, that Strother has, upon the authority of these judgments and the mortgage aforesaid, obtained from Stephen Duncan, the president and agent of said Rail Road Company, the proceeds, for which one-half of the property of the company was sold, Strother in virtue of the aforesaid mortgage and judgments representing him (Lard) ; by means whereof Strother received \$18,000, one-third of which belonged to him (Lard.) He alleges, that these \$6000 were received in the year 1838, and that in virtue of the aforesaid mortgage and judgments, Strother and wife have since sold the other half of his (Lard's) interest, which is worth \$6000 more, which they have received. It is further alleged, that the fact of the receipt of these \$12,000 has come to the knowledge of the petitioner since he signed the twelve months bond. He avers, that the two judgments were in fact more than extinguished by compensation before the order of seizure and sale was issued. He alleges, that a large balance is due to him on account of the proceeds of the rail road, which he claims against Strother and wife, against whom he prays for an attachment to seize the debt in his own hands, and for an injunction to prevent any execution from being issued on the bond. He further prays for a judgment in his favor, against the defendants, for the balance due, after the extinguishment of the bond.

Upon the affidavit of the plaintiff, and on his giving bond and

security in the sum of \$9000, an attachment and injunction were issued ; and a curator *ad hoc* was appointed to represent the absent defendants, upon whom the petition and attachment were served, although the defendants had an attorney of record in the case of the application for the order of seizure and sale. It may be proper to observe, that this curator *ad hoc* seems never to have acted in the case, or to have taken any step to assist the defendants.

At the first term of the court, the defendants appeared by their counsel, and moved to dissolve the attachment, because the person who had signed the bond as security was totally insufficient ; and also to dissolve the injunction, for the same cause, and for the further reason that the affidavit was insufficient and informal. The bond required to be given was for \$9000. The sheriff was examined as a witness, who said that he considered the surety good when he signed the bond, but he does not certify to his solvency at the time of the trial. Other witnesses were examined as to his property, and the defendants showed from the record of mortgages various special mortgages and judgments recorded against him, amounting to a large sum ; and further, that since the bond was signed, the surety had sold to a free colored woman, as the deed states, for cash, a tract of land, which constituted a large part of his property.

The judge decided the surety to be sufficient, as under the peculiar circumstances the liability of the surety was not likely to be great ; and he, therefore, refused to dissolve the attachment. He also refused to dissolve the injunction, considering it a case coming within the meaning of articles 739 and 740 of the Code of Practice. He also held the affidavit to be sufficient.

The defendants then filed their answer, containing a general denial, a plea of *res judicata*, and an allegation that all the rights which Lard ever had in the rail road, had been seized and sold in the year 1835, under an attachment taken out by one Noah Barlow.

After a long contest in the inferior court, the plaintiff had a judgment, perpetuating the injunction against the twelve months bond, on the ground that it was extinguished by the funds which Strother had received from the rail road, or its proceeds, and,

also, recovering from Strother and wife, *in solido*, the sum of \$9438 72; from which they have appealed.

In this court, the appellants urge, that the judge erred in refusing to dissolve the attachment and injunction on account of the insufficiency of the affidavit and of the surety on the bond. As relates to the affidavit, we think the judge did not err. It states, in a manner sufficiently clear, the allegations relied on, and complies with the provisions of the Code of Practice in relation to affidavits.* But we differ widely with the judge as to the sufficiency of the surety on the bond, and think the principle he adopted, of looking to what might be the ultimate liability of the surety, instead of his present means, as one that may lead to dangerous results. Articles 3011 and 3033 of the Civil Code provide, that whenever a person is bound by law, or by a judgment, to give a surety he must present one, who in addition to other qualifications, has property sufficient to answer for the amount of the obligation; and article 3012 declares, that whenever a surety received by a creditor, either voluntarily or by the direction of the law, becomes insolvent, his place must be supplied by another. In this case Lard was bound to give security for \$9000; he offered a man whose debts are shown to amount to about \$14,000, and his property to \$12,000. The sheriff says that he considered him good at the time he signed the bond; but he looked to his property, without knowing any thing of his liabilities. We do not, under the evidence, consider James Clemmons as sufficient surety on a bond for \$9000; and we think that the

* The affidavit was in these words:

Samuel A. Lard, the plaintiff in the above case, makes affidavit that Reuben Strother, and his wife, Ann Strother, are justly indebted to your affiant in the sum of \$6000; that said Reuben Strother, and his wife Ann reside out of the State of Louisiana; that they have become indebted to this affiant in the aforesaid sum of money since the rendition of two judgments against this affiant in the Circuit Court of Adams county, in the State of Mississippi, in March, 1835, &c.; that the fact of Strother and wife's having received the affiant's interest in the Natchez Rail Road, amounting to the sum of \$6000, has come to his knowledge since he purchased his own property, and gave the twelve months bond, on the 4th June, 1840, sold under the order of seizure and sale issued on the two judgments rendered in the Circuit Court of Adams county, Mississippi, &c.

judge ought to have compelled the plaintiff to give other security, or have dismissed the attachment, and dissolved the injunction.

On the trial, various bills of exception were taken, which are insisted upon here.

The first is to the admission by the court of Noah Barlow to testify as a witness, on the ground that he was interested. He stated that he was a creditor of the plaintiff; and it further appeared that all his (plaintiff's) property was affected by the debt claimed by the appellants; wherefore their counsel insists, that Barlow had an interest in defeating their claim, as its defeat would give him a chance of being paid. This may be true, but it has been long settled, that the fact of being a creditor of a party to a suit, does not disqualify a witness from testifying in it.

The next objection was, that Barlow was a stockholder in the Rail Road Company, and was, therefore, incompetent. We see no force in this objection. The company was not incorporated, and though it had been, we could see no reason or authority for excluding one partner in a company, from testifying, in a controversy between two of his associates, in relation to matters in which he has no interest.

The defendants next objected, that the parol evidence of Barlow was not the best which the nature of the case admitted; that he could not testify to the contents of papers which were in writing; and that a title to real estate could not be proved by his parol statements. But the judge overruled all the objections, and permitted him to testify generally. We think that in some of the objections of the defendants there is much force. As to the sale of the property made by the company to the Corporation of Natchez, it was shown to have been made at auction, and a conveyance executed in writing. The mortgage or sale made by the appellants to Roach, and that from Barlow himself to the defendants, were also in writing. No reason is given why the originals, or copies of these instruments, could not be produced. No effort seems to have been made to procure them, and they would certainly be better data to decide on, than the recollection of the witness alone. We are not to be understood as deciding that the parol evidence cannot be admitted at all; but that some cause should be shown why the better evidence could not be produced.

The defendants also objected to the reading, on behalf of the plaintiff, of certain depositions taken before Robitaille, at Natchez, on a number of grounds. The judge overruled these objections, and admitted the depositions in evidence, to which the appellants excepted. The first objection is, that the interrogatories were not served on the defendants, or their counsel, previous to sending them to obtain the answers of the witnesses. The plaintiff shows, that previous to the cause being at issue, he had filed the interrogatories, and had them served on the curator *ad hoc* whom he had procured to be appointed; and this, his counsel contends, is sufficient, and so thought the judge; but we cannot concur in the opinion. This is not one of the cases in which a curator *ad hoc* should have been appointed, and the one named never acted. The remedy adopted in this case to bring the parties into court, is by attachment, and our laws point out a plain course to be pursued in such cases. If the appellants had no counsel within the jurisdiction of the court, one should have been appointed for them, and the proceedings have been conducted contradictorily with him; but in the case before us, the appellants had counsel in the parish, who was not notified of these interrogatories. The interrogatories should have been presented to the defendants, or to their counsel, and this not having been done, the depositions must be rejected.

Without the testimony of Duncan, Ferriday, Taylor, Vannencan, and others, there is not sufficient evidence to sustain the judgment of the lower court; but under the circumstances, we do not think it would be just to non-suit the plaintiff, who seems to have equity on his side.

The judgment of the District Court is, therefore, annulled and reversed, and the cause remanded for a new trial, with directions to the judge below on the trial thereof, to conform to the principles herein expressed, in relation to the security on the attachment and injunction bond, and the admission or rejection of the evidence, and otherwise to conform to law; the plaintiff paying the costs of the appeal.

Paterson, for the plaintiff.

Ulsley and Stevens, for the appellants.

Bissell v. Leftwich, administrator.

FREDERICK N. BISSELL v. AUGUSTUS J. LEFTWICH,
Administrator.

APPEAL from the Court of Probates of Iberville, *Dutton*, J.

GARLAND, J. This action was instituted to recover the amount of an account for the board and lodging of the deceased, of his wife, and a small servant for four months previous to January, 1839; for washing their clothes during that period; for the boarding of several negro children under ten years of age, and of a sick negro for two months. The defendant answered by a general denial, a plea of prescription, and a demand for the hire of several slaves belonging to the wife of the deceased. [There was a judgment in favor of the plaintiff for \$265, from which the defendant has appealed.]

The evidence shows that the plaintiff is the keeper of a tavern or boarding house. Lindsay married the daughter of the plaintiff's wife, in the month of August, 1838, and remained with her in the house about four months, for which the sum of \$200 is charged. No contract is shown; but the residence of Lindsay and his wife is proved, and that \$50 per month for board is a reasonable price. The sum of \$40 is charged for washing their clothes during that period; but there is no evidence to sustain the charge.

As to the charge for boarding the servant and young children: It appears that they were the children of slaves belonging to Lindsay's wife, which she had agreed, previous to her marriage, that the plaintiff and his wife should hold for twenty years, if they should live so long, or during their respective lives, as usufructuaries, for which a fixed sum was paid. It was proved that a sick negro was sent to the plaintiff's house in the year 1839; and that the charge of \$60 for board and attention to him is correct.

Article 3499 of the Civil Code declares that the claims of inn-keepers and such others, for the board and lodging which they furnish, shall be prescribed by the lapse of one year. Lindsay was married to the step-daughter of the plaintiff in August, 1838;

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they remained at his house about four months afterwards. Lindsay died in December, 1839; and no claim was presented to him, or to his administrator, until the month of May, 1840. There cannot be any doubt that, for three of the months charged, the plea of prescription must prevail, according to the article 3500 of the Code; and the testimony induces us to believe, that one year had expired after Lindsay and his wife left the plaintiff's house, before he (Lindsay) died. The plaintiff has not shown the precise dates, and thereby leaves his claim uncertain. The presumption as to prescription is, from the evidence, in favor of the defendant; and the plaintiff cannot recover.

We have before said that there is no evidence to support the charge for washing. As to the claim for the board of the young slaves, there is no foundation for it according to the plaintiff's own testimony. He and his wife have the usufruct of the father, mother, and elder brother and sisters of these children, which is proved to be worth \$75 per month; and they are not entitled to any thing for boarding children, to whose services they claim a right for many years to come.

The only portion of the plaintiff's claim sustained by the law and testimony, is that for the boarding and attention to the sick negro.

The judgment of the probate court is therefore annulled and reversed; and it is ordered and decreed that the plaintiff, F. N. Bissell, do recover of the defendant, Leftwich, as administrator of Lindsay's estate, the sum of sixty dollars, with interest at five per cent. per annum from the 31st December, in the year 1839, until paid, if the estate be able to pay all the debts; the said sum and interest to be paid in the due course of administration, according to law. The costs in the probate court to be paid by the defendant, and those of this appeal by the plaintiff.

Labauve, for the plaintiff.

Edwards, for the appellant.

DOSILLIAT ORILLION and others v. HONORÉ F. DEBLIEUX.

APPEAL from the District Court of Iberville, *Dutton, J.*, presiding.

Labauve, for the appellants.

Deblieux, pro se.

SIMON, J. The plaintiffs set up title under the government of the United States to a tract of land, which they describe in their petition as being situated on the right bank of the Mississippi, adjoining and in the rear of the lands and double concession of Joseph Huguet, and surveyed as containing about one hundred and sixty superficial acres. They allege that this tract of land, having been duly entered under the act of congress of the 12th of April, 1814, and paid for on the 18th of February, 1824, was afterwards surveyed and located by the government in or about the year 1830, immediately back of, and adjoining the double or second concession of Joseph Huguet, as specified in the application, &c., and described as section or lot No. 98, in township 10, range 13 east, and as being the same that Joseph Lacroix settled and built upon under the said act of congress.

The defendant first denies that the plaintiffs have any title to the land by them claimed, and avers that, if they have obtained any title to it, or any order of survey or location of any claim thereon, such title or order of survey or location, was obtained illegally and through fraud. He further states that he is the owner of the land sued for, having purchased the same from the United States on the 27th of December, 1830; that after having sold it to one Deslonde, who subsequently conveyed it to J. B. Roy, said tract of land was re-purchased by respondent from Roy's successors. He further avers that the purchase of Lacroix's heirs, on the 18th February, 1824, on which plaintiffs rest their claim, cannot be made to apply to the land in dispute; that the purchase of Lacroix's heirs was located on other lands, subsequently to the purchase made by respondent from the United States; and that if any other location has been since made, the same is illegal and in fraud of his rights.

The respective titles and locations of the parties were fully investigated, and judgment having been rendered below in favor of the defendant, the plaintiffs appealed.

The evidence shows that, under the act of congress of the 12th of April, 1814, the heirs of Lacroix, on the 13th of March, 1820, filed in the land office their claim or pre-emption right to a tract of land described as "a tract of public land, in the parish of Iberville, on the right bank of the Mississippi, and *adjoining the land* surveyed for Joseph Huguet by Walker Gilbert, principal deputy surveyor of the said district, or a *second concession*;" that, on the 17th of February, 1824, the Register issued his warrant or certificate at the foot of the application, stating that the claimants were entitled to 160 superficial acres of land, as applied for; that, on the 5th of April, 1823, the Register had given another certificate, in which he certified Lacroix's pre-emption claim, to be adjoining lands surveyed for Joseph Huguet by Walker Gilbert; that, on the 18th of February, 1824, the heirs of Lacroix paid the Receiver for the land to which they, in their application, claimed a pre-emption right. The receipt describes the land as being in the rear of lands owned by Joseph Huguet, in the parish of Iberville, and refers to the Register's certificate No. 34, dated the day previous. The order of survey is dated the 28th of October, 1825. During the period which elapsed between the application and the payment, it appears that Joseph Huguet, on the 18th April, 1822, purchased and paid for *the back land* or *second concession* of his first tract; and that, in April, 1834, a suit was instituted by the present plaintiffs against one Deslonde, who claimed under Joseph Huguet, for the same tract of land, under the titles produced in that suit; and this controversy was terminated by a judgment in favor of the defendant against the present plaintiffs, which judgment was affirmed, on appeal, by this court. 9 La. 53. The question there was, whether the plaintiffs or the defendant had acquired the best title from the government of the United States to the land in controversy, as it appeared that the location of both was to be on the same spot.

It is also, in evidence in this suit, that, on the 21st of January, 1834, previous to the institution of their suit against Deslonde,

and in compliance with the instructions of the Surveyor General, dated the 31st of December, 1833, the plaintiffs' claim was located by regular survey, duly approved; which location interfered with that of Joseph Huguet's claim, and was made the basis of the aforesaid suit. In 1838, after the suit was decided, the plaintiffs caused another location to be made, interfering with the location of the present defendant's claim. The plat of this location, though objected to by the defendant, was admitted in evidence by the judge *a quo*, to whose opinion the defendant excepted. This plat, however, though certified by the Surveyor General, does not appear to have ever been approved.

The evidence shows, further, that the defendant made his purchase of the tract of land in controversy on the 27th of December, 1830; his receipt states that the sum paid by him is in full of the purchase money of lot 98 of public lands, township 10, range 13 east, in the south-eastern district of Louisiana; and the Register's certificate also produced, shows that the purchase was made under the President's proclamation, dated 5th June, 1830.

It is worthy of remark that the plaintiffs have not made any attempt to show the spot on which their improvements existed, at the time they made their application to the land office. Their claim is a *pre-emption right* founded upon *actual settlement and occupancy*. They state, in their written application, that J. Lacroix did *actually inhabit and cultivate* the land claimed from the year 1812 until his death in 1817. As it would have been easy for them to establish a fact of such importance, the absence of any proof necessarily raises against them the presumption that the location claimed by them, is not on the same spot which their ancestor inhabited, and which he cultivated between 1812 and 1817.

In this state of the case, it appears to us that the plaintiffs have not shown any right or title to the tract of land sued for, authorizing a location in conflict with, and in preference to that of the defendant. The application they made in 1820, was for a tract of land *adjoining the land surveyed for Joseph Huguet*. They call it a *second concession*; and at that time, Joseph Huguet had not acquired any right or title to the tract which he purchased in April, 1822; the second concession was still vacant, and although,

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in 1824, the land purchased by the plaintiffs is described as being *in the rear of lands* owned by Joseph Huguet, we do not hesitate to say that these expressions are to be understood in reference to the first application, and as meaning that the tract of land purchased, was situated in the second concession of Joseph Huguet's front tract, and was to be there located, and not elsewhere. The plaintiffs themselves understood it so, when they located their tract in conflict with that of Joseph Huguet, and when they instituted their action against Deslonde, who held under Huguet. The survey in 1833 was made at their request; it was to serve as the basis of their suit against Deslonde; and whatever subsequent survey they may have caused to be made (after they were defeated in their first action,) to suit their own purposes, cannot now, to the prejudice of other persons, change their first location, which, in our opinion, was in accordance with the real purport of their title. We therefore agree with the judge *a quo*, that the evidence shows that the location of the plaintiffs' improvements or settlement, upon which they claimed their right of pre-emption, was not upon the land claimed by the defendant.

Judgment affirmed.

JOHN M. PHILLIPS v. ANDREW MCCOLLOM, and another.

APPEAL from the District Court of Ascension, *Deblieux, J.*

GARLAND, J. This is an action by the holder against the maker and endorser of a promissory note. The former only is before us. He alleges that the note was given to secure the payment of part of the price of a tract of land near the mouth of Red River, and of several slaves, cattle, &c.; and avers that the plaintiff had no title to the land, and could not convey any; wherefore there was a failure of consideration. The plaintiff had a judgment below, and the defendant McCollom has appealed.

Previous to the trial, the defendant McCollom interrogated the

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plaintiff as to the consideration of the note, who answered, among many other things, that this note was given in renewal of one that had been executed to secure the price of the slaves and cattle, which were sold separately from the land, and at a different time. This answer is not contradicted, except by one witness, and settles the case, as the title to the slaves and cattle is not controverted or denied. All the testimony of the witnesses, except one, seems to relate to the notes given to secure the price of the land.

It is not shown that the defendant, McCollom, or his partners, have ever been disturbed in the possession of the land or slaves; nor have they ever offered to return them to the plaintiff. There is no equity in holding on to the property, and refusing to pay the notes.

M. Taylor, for the plaintiff.

Ilseley & Nicholls, for the appellant.

Judgment affirmed.

JOHN RUCKER WHITE v. CELESTIN GUYOT.

APPEAL from the District Court of Lafourche Interior,
Nicholls J.

BULLARD, J. White having sold to Guyot two slaves and received a mortgage to secure the payment of the price, sued out an order of seizure and sale at the maturity of the first note. His proceedings were arrested by injunction, obtained on an allegation that one of the slaves, a female, was, at the time of the sale, afflicted with disgusting diseases which rendered her absolutely useless, and that he (Guyot) would not have purchased her, had he known of their existence. He further charges that the vendor represented the slaves to be good, useful, and efficient, and free from any disease; and that he knew that the slave, Fanny, was not such as he represented her to be. He further represents, that the vices of body were such as not to be discoverable on simple inspection. He, therefore, prays for a rescission of the sale, and for

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two hundred dollars as damages for the trouble and expense he has been put to in defending the suit, and supporting said slave.

The vendor is appellant from a judgment cancelling the sale of Fanny, and awarding one hundred and forty dollars as damages.

The evidence leaves it doubtful whether the disease with which the slave was affected was venereal or *fluor albus*. The medical gentlemen who were examined could not be expected to agree perfectly in the matter. It cannot be expected of us, to follow them in the disgusting details of such a case. Suffice it to say, that the whole evidence together leaves it doubtful in our minds, whether the plaintiff be entitled to the relief he has sought, more especially as it would seem that the slave is now in better health. Justice, in our opinion, requires that the case should be remanded for a new trial.

It is therefore ordered and decreed that the judgment of the District Court be reversed, and that the case be remanded for a new trial; and that the costs of the appeal be paid by the appellee.

Beatty, for the appellant.

Thibodeaux and *Cole*, for the defendant.

EZEKIEL HUM and another v. THE UNION BANK OF LOUISIANA.

The provision of art. 2976 of the Civil Code that "the attorney is answerable for the person substituted by him to manage in his stead, if the procuration do not empower him to substitute," implies that he is not answerable if it did so empower him; and the power is implied whenever the principal knew that the mandatary would be obliged to act by a substitute.

Bills of exchange and promissory notes are generally placed with a bank for collection, with a notary for protest, and with an attorney to be put in suit. In such cases where the bank, the notary, or the attorney is *omni exceptione major*, an agent who may have received the note for collection, will not be responsible for their neglect or misconduct.

APPEAL from the Commercial Court of New Orleans,
Watts, J.

MARTIN, J. The Union Bank is appellant from a judgment, by which the plaintiffs have recovered the amount of a note sent to it for collection, payable in Natchez, and by it sent for collection to a bank there, which received the amount and afterwards failed to pay it over. The evidence shows that the bank was in the habit of collecting notes sent by the plaintiffs, who reside in Philadelphia, and charged a commission therefor. The note reached New Orleans on the 22d of February; was sent to the Commercial Bank of Natchez immediately, and notice thereof given to the plaintiffs on the next day. The defendants resist the claim on the ground that they employed a competent and solvent agent, in good credit at the time, to collect the money. The court was of opinion "that there are many cases in which this plea would be a good defence. If a bank employ a notary of good standing to protest a bill, or a merchant place a note for collection in the hands of an attorney of good standing, they would not be responsible for the conduct of a person so selected as they are obliged to employ persons of that description, licensed by law. But with regard to commercial agencies it is otherwise. The defendants were at liberty to decline the agency, and there was sufficient time between the 22d of February and the 22d of March, to have notified the plaintiffs to appoint some other agent. If the time had been too short for the purpose, they might have forwarded the note for collection to some proper agent at Natchez, and have notified immediately the plaintiffs that they had done so, *at his risk*; but when they undertook the agency themselves, and declared their intention to charge a commission for it, they bound themselves for the acts and conduct of the agent whom they selected."

The judge, in our opinion erred. There is no evidence that the notes sent by the plaintiffs to the defendants for collection, theretofore, were payable at a distance from New Orleans. The defendants, on receiving the note, immediately expressed their unwillingness to attend to the collection of notes payable out of the city. The Civil Code, art. 2976, provides that "the attorney is answerable for the person substituted by him to manage in his

stead, if the procuration did not empower him to substitute." This is an affirmative pregnant with the negative, that he is not answerable if the procuration did empower him to substitute. This power is implied, whenever the principal knows that the mandatary will necessarily be obliged to act by a substitute. The plaintiffs knew that the bank could not go personally to Natchez, nor send its cashier there, because his absence would have been extremely inconvenient to them, and his travelling expenses burthensome to the plaintiffs; so that they could not expect that the defendants would resort to any other than the ordinary mode of collection, to wit: the agency of a bank at the place where the note was payable. The power of using another bank as a substitute, was, therefore, implied. The judge appears to think that the defendants might have declined the agency, as it was of a different kind from that in which it had been theretofore employed. It does not appear to us that this would have been safe, as there was not sufficient time. The note was sent from Philadelphia on the 8th, and reached New Orleans on the 22d, being fourteen days on its way. It was payable on the 22d of March, twenty-eight days after it reached the bank. It is, therefore, probable that it would have required fourteen days to return to Philadelphia and probably as many to come from thence to Natchez; so that the least failure in the mail might have prevented its timely protest. The judge thinks that the plaintiffs ought to have been informed that the note was sent to the Commercial Bank at Natchez *at their risk*. We are unable to see the utility of this. If the law and the circumstances rendered the defendants obnoxious to the risk, they could not have transferred it to the plaintiffs and liberated themselves from it by informing them that the note was at the plaintiffs' risk. In commercial matters, bills and notes are generally, we might almost say, universally placed in a bank for collection, in a notary's office for protest, in that of an attorney, to be put in suit. In either case, when the bank, the notary, or the attorney is, *omni exceptione major*, the agent who received the note is free from responsibility, on account of the neglect or misconduct of the bank, the notary, or the attorney.

It is therefore ordered, that the judgment of the Commercial

Collins and another v. Daley and others.

Court be annulled and reversed, and that ours be for the defendants, with the costs in both courts.

Potts, for the plaintiffs.

H. R. Denis, for the appellants.

THOMAS W. COLLINS and another v. PETER DALY and others.

The purchaser at a sheriff's sale cannot refuse to pay the price he has bid, on the ground that there existed mortgages on the property of an older date than that under which he purchased, or that the legal formalities have not been complied with, unless he has been disturbed in his possession, or has just reason to apprehend that he will be. C. P. 710.

APPEAL from the City Court of New Orleans, *Cooley, J.*

GARLAND, J. Daly obtained two judgments against Donaldson as drawer, and Walker as endorser of a promissory note. On one of them an execution was issued, and, by the consent in writing of the wife of the endorser, two lots, which she had sometime before purchased, were seized, and sold on twelve months credit, to satisfy the execution. They were adjudged to Donaldson, who executed three twelve months bonds to the City Marshal, amounting together to about \$470, on which Collins became security. The bonds were not paid when due. An execution was issued and levied on the lots, which were sold for \$135 in cash. For the purpose of making the balance of the money, a seizure was made of certain rights and credits belonging to Collins, whereupon he and Donaldson presented a petition, stating that Daly had obtained a judgment against Walker alone; and that under it, the aforesaid lots had been seized, sold, and purchased as before stated, and again sold. The petitioners aver that they have since discovered that the lots, although sold as clear of mortgages, and as the property of Walker's wife, in fact belonged to the community between Walker and his wife, and that they are encumbered with various mortgages greatly exceeding their value. They further allege, that if the property really belongs to Walker's wife, it is not liable to seizure and sale for

the debts of her husband, even with her consent; and that the deed from the marshal conveys all the right of Walker's wife to the lots, instead of that of Walker himself. They aver that for these reasons they have refused to pay the twelve months' bonds; they pray for an injunction against the marshal of the City Court, Daly, and Walker, and his wife, and for a rescission of the sale.

The answer is a general denial; an averment that the lots were sold to pay a debt due by Donaldson; and that he knew every thing about the title to, and incumbrances on the lots. The defendants, therefore, pray for a dissolution of the injunction, and for a judgment against the petitioners, and their security, *in solido*, for ten per cent interest on the amount due, and for twenty per cent damages.

The court below dissolved the injunction, allowing interest and damages; and the plaintiffs, with their security have appealed.

We have not a doubt of the correctness of the judgment. On the part of Donaldson, neither law or equity will sustain him. Under an execution against the endorser of his note, the property of the wife of the endorser was seized by her consent; he (Donaldson) purchases it on twelve months credit; and, at the expiration of the time, instead of paying his debt, and restoring to her the property, he permits it to be sold, and afterwards attempts to set aside the sale by pretending that there were defects in the title to the lots, which he ought as an honest man, to have protected from sale, and have restored to the rightful owner.

It is the well established doctrine of this court, that the purchaser at a sheriff's sale cannot refuse to pay the price he has bid, on the ground that there existed mortgages on the property previous to that under which he buys, or that the legal formalities have not been complied with, unless he has been disturbed in his possession, or has just reason to apprehend it. Such is the language of article 710 of the Code of Practice, and of the court under the law as it existed previously. 4 Mart. 400. 3 Mart. N. S. 220, 674. 5 Ib. 79. Donaldson has not shown any disturbance of his possession of the lots, nor any reasonable ap-

Rousse and others v. Wheeler and wife.

prehensions of it; and the zeal now shown to protect the interest of Walker's wife comes rather too late to obtain credit for sincerity. We shall leave it to her care, and that of her husband.

The appellees have asked us to amend the judgment of the City Court in their favor, by allowing ten per cent interest on the amount enjoined, and twenty per cent damages against the plaintiffs and their surety. The case presents so little equity, that we think it but right to make the plaintiffs pay a higher rate of damages than that allowed by the judge below.

The judgment of the City Court is therefore amended, by allowing the plaintiffs twenty per cent damages, to wit, the sum of sixty-eight dollars and fifty cents; and in other respects it is affirmed, with costs.

Preaux, for the appellants.

Bartlette, for the defendants.

ADELINE ROUSSE and others v. SAMUEL SMITH WHEELER
and wife.

Property purchased with the paraphernal funds of the wife, only becomes her separate property while she keeps the administration of her separate estate, and when the title is taken in her own name, either as a purchase with the funds which she administers herself, or as a *dation en payement* made to her by the debtor of a separate and paraphernal debt.

Property purchased during marriage in the name of the husband and wife, though paid for in whole or in part by the funds of the wife, will belong to the community of *acquets*, but subject to a charge, in her favor, for the amount by which the community may have been thereby benefited; and she will have, as in the case of her paraphernal funds having been used by the husband for his individual benefit, a mortgage on all his property for the reimbursement thereof. C. C. 2367.

A wife cannot bind herself *in solido* with her husband, for a debt contracted during the marriage, on account of the community. C. C. 2412.

An assignment by the husband of a paraphernal debt due to the wife, in payment for property purchased in the name of the community, will be valid, where, by the contract of marriage, the administration of her paraphernal property is entrusted to him; but he will be responsible to her for the reimbursement of its amount. C. C. 2367.

APPEAL from the District Court of Lafourche Interior, *Deblieux, J.*

SIMON, J. The facts of this case, are these : In February, 1829, the defendant Wheeler, contracted marriage with his co-defendant who was a widow. A marriage contract was passed between the parties, by which it was stipulated that the property brought in marriage by the future wife, as well as that which may accrue to her thereafter by succession, donation, legacy, or otherwise, shall be considered as paraphernal, and that the same shall be administered by the husband, and shall be alienable, and liable to mortgage, by and with his consent. In February, 1833, the parties sold and conveyed to Collins, the property brought into the marriage by the wife, and other property acquired by the husband during the marriage. The sale was made on long terms of credit, the three last instalments, of \$3000 each, falling due in March, 1841, 1842, and 1843. In February, 1836, the defendant purchased of the plaintiffs' ancestor, John Rousse, a tract of land, and a certain mortgage, with other debts due to Rousse from various individuals. The sale was made to the defendants *jointly and severally, and to their heirs and assigns*, for and in consideration of the sum of \$9743, 64, which the purchasers promised, *in solido*, to pay to the vendor, as follows : \$743,64 as soon as so much shall have been collected by the defendants on the divers claims therein detailed ; and as to the balance of \$9000, it was stipulated that it should be paid out of the collections to be made by Wheeler, on or before the first day of March, 1846, but not before the first of March, 1841, provided the purchasers, or either of them do pay annually, interest at the rate of eight per cent per annum on all sums due and collected, according to certain modifications and further stipulations contained in the notarial deed of sale. It was further stipulated, that, as collateral security for the balance of \$9000, the purchaser should assign the three last instalments due to them by Collins, amounting to a like sum of \$9000, for the price of the property sold to him by the defendants ; the defendant being, however, entitled to redeem the assignment and to collect the instalments, on paying the amount thereof to the vendors, Rousse and wife, in discharge of the balance due on the sale, and the interest then accrued thereon,

or on their giving new collateral security for the said balance, or any part thereof then due.

The plaintiffs, the widow and heirs of Rousse, now seek to enforce their right against Wheeler and his wife, by virtue of the stipulations contained in the above mentioned act of sale, and they claim judgment against them for the sum of \$8000, (the balance remaining due,) with interest at the rate of eight per cent. from the 1st of April, 1841; further praying that the debt due by Collins, may be assigned to them for as much as it will pay.

The defendant Wheeler's wife, answered, that she admitted having signed the act of sale mentioned in the plaintiffs' petition, by which she and her husband bound themselves, *in solido*, for the price therein stipulated; but that the sale was in fact, a sale to her husband, as the head of the community; that she was not individually interested in the purchase; and that she derived no advantage or benefit from the same. She further averred that, by signing the act, she did not become bound and liable, either as principal or as security, in her separate capacity, and that her separate property can in no manner be held responsible for the payment; that the property sold to Collins, a part of the price of which is alleged to have been assigned as collateral security, was her separate property; and that the plaintiffs are not entitled to have the debt due by Collins sold to satisfy their claim, or to have the same transferred to them. Wherefore she prayed that the sale made by Rousse and wife be, as to her, declared null and void; and that the debt due by Collins be declared not pledged, or in any other manner bound for the payment of the plaintiffs' claim.

This case was submitted to the lower court on the questions agreed upon by the counsel of the parties, to wit: "Whether Wheeler's wife was personally liable in all, or any part of her individual property, for the amount of the price contracted by herself and husband to be paid to Rousse and wife, by the act of sale declared upon by the plaintiffs? And whether, supposing that she is not personally liable under said sale for the price, the assignment of the debt of Collins, stipulated in the sale, be valid, if said debt be due as the price of Wheeler's wife's separate property?"

These questions were answered negatively by the judgment rendered below, from which the plaintiffs have appealed.

It is first contended, on the part of the plaintiffs, that the wife could legally invest her paraphernal effects in any species of property, real or personal; and that any property which she might buy with her paraphernal effects, or obligations, became paraphernal. Hence it is argued, that the contract of sale under consideration was executed for the purpose of investing Mrs. Wheeler's claim against Collins in the purchase of property; and that such property, so far as paid for with her funds, does not belong to the community, but to her individually.

We have already seen that the purchase was made by the husband and wife jointly and severally, without any distinction having been made between the portion of the price to be paid with the wife's funds, and that to be paid with the funds of the husband, or those of the community. It was a purchase made by the two spouses during the marriage, to be paid for with the funds of both, and, if insufficient, with those of the community. The wife's property was not, then, under her administration or control; and although a part of the proceeds of the sale of her property to Collins, was assigned as collateral security, for the payment of the purchase money, it is clear that it was not given in payment, and that its amount was not reinvested in the purchase of the property sold by Rousse to herself and her husband. By her marriage contract, the property of the wife was declared to be paraphernal. It was immediately placed under the administration of her husband, with a power to alienate and mortgage it as she pleased, provided his consent was obtained; and accordingly, the same was sold to Collins, by both husband and wife, for a certain price, which was received in lieu of her paraphernal property, and which went back under the administration of the husband, as paraphernal funds. Mrs. Wheeler never resumed the administration of her paraphernal estate; it always remained under the control of her husband; and although she appeared in the act in which a part of the price to be paid by Collins is assigned to the vendors, we cannot view this as an act of administration on her part, sufficient to show that she really intended to invest those funds, not then under her actual administration, in the purchase

of property. In the case of *Dominguez v. Lee et al.*, 17 La. 300, we said, that "property purchased with the paraphernal funds of the wife, only becomes her separate property, as long as she keeps the administration of her separate estate, and when the title is taken in her own name, either as a purchase with the funds which she administers herself, or as a *dation en paiement* made to her by the debtor of a separate and paraphernal claim." That doctrine was again sanctioned by this court in the case of *Terrell v. Cutrer*, 1 Robinson, 367, in which we recognized the wife's right to reinvest the proceeds of the property by her disposed of, while in the administration of her paraphernal property, as a reinvestment of money under her control. Here, there was no such reinvestment in view. Nay, the wife even disclaims in her answer any such intention. The act of sale, by itself, does not show any such object in the contract; and, in our opinion, the property acquired from Rousse and wife, though partly bought with, or the price thereof secured by the transfer or assignment of a debt proceeding from the sale of the wife's paraphernal property, properly belonged to the community, as having been purchased by the two spouses during the marriage. Civil Code, arts. 2314 and 2371, 10 La. 180. Such purchase, however, if made, or paid for, with funds belonging to the wife, should enter into the community of *acquets* and gains, with a legal charge against it in her favor, for the amount of the price or part thereof from which the community may have been benefited; and with a mortgage on all the property of the husband for the reimbursing of the same. Civil Code, art. 2367.

The contract under consideration being viewed in this light, what is the nature of the wife's obligation therein contained? The purchase was made for the community by the husband, who is the head or master thereof. In making the purchase, he contracted a debt for the payment of which his wife bound herself *in solido* with him; and this is, on her part, a *personal obligation*, independent of the assignment of the debt due by Collins, which we shall have occasion to consider hereafter. The purchase having been made on account of the community, it is clear that the wife cannot bind herself *in solido* with her husband for

a debt contracted during the marriage. The husband alone should be bound. Civil Code, art. 2412, 1 Robinson, 218.

It has next been urged that, even supposing that the whole of the property bought of Rousse became community property, the husband had, with the assent of his wife, the right to alienate her paraphernal effects, and had even alone, the right of alienating her paraphernal moveable effects or obligations. Hence, we suppose it is inferred that he could validly assign to the vendors of the community property, the amount of the debt due by Collins, or apply the proceeds thereof to the payment of its price. By the marriage contract already noticed, we have seen that the wife's paraphernal property was put under the control and administration of the husband. This was an assent, on the part of the wife, to the husband's investing her paraphernal funds in the way he pleased. He had a right to receive her moneys, and as long as he retained the administration, he was even considered by law as having under his exclusive control, and being entitled to recover in his own name, the debts due to his wife. Code of Practice, art. 107. 4 La. 484. If so, could not the husband transfer the debt due by Collins in payment of the purchase of community property? Is there any difference between the defendant Wheeler's receiving the funds from Collins, and paying them over to the plaintiffs, and his assigning the claim to his vendors in payment of the purchase? We think not. In both cases, the funds, or the debt are in his hands and under his control, as administrator of his wife's paraphernal estate; and in both cases, he is responsible to his wife for the reimbursement of the paraphernal funds, or debt, which may have been used by him for his individual interest, or for the benefit of the community. Civil Code, art. 2367. Nay, we have already said that in the latter case, this constituted in her favor a legal charge against the community. Furthermore, is it not obvious that if the assignment under consideration were to be set aside, by our sustaining the wife's pretensions, this would not prevent the husband's recovering the debt due by Collins? She never resumed the administration of her paraphernal estate. It is yet under the control of the husband. He has still a right to receive the money, and to apply it to the

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extinguishment of the claim sued for. This point appears to us too clear to require any further investigation.

Under this view of the questions submitted to our consideration, we conclude, that the judge *a quo* did not err in setting aside the personal obligation of Mrs. Wheeler *in solido* with her husband; but that he erred in annulling the assignment of the debt due by Collins; or, in other words, we are of opinion that, under the contract sued on, the plaintiffs are entitled to apply to the payment and satisfaction of their claim, so much of the said debt, after recovery, as may be sufficient to discharge the obligation contracted by the defendant Wheeler.

It is therefore ordered, and decreed that the judgment of the District Court, so far as it invalidates the personal obligation contracted by Mrs. Wheeler, and liquidates the plaintiffs' claim against her co-defendant, be affirmed; that with regard to the assignment of the debt due by Collins, which it invalidates to the extent of the wife's interest, the same be annulled and reversed; and it is further ordered and decreed that the whole debt due by Collins be assigned over to the plaintiffs, according to the stipulations contained in the act of sale annexed to the plaintiffs' petition, and that the amount of the same, or so much thereof as may be sufficient, be first applied, after recovery, to the payment and satisfaction of the judgment rendered below against the defendant Wheeler; the costs of this appeal to be paid by the appellees, and those of the lower court to be borne by said Wheeler.

Beatty, for the appellants.

Thibodeaux and *Cole* for the defendants.

JOSEPH ORILLION and another v. ELIPHALET SLACK.

Where the proprietor of two estates has alienated one of them, in any contest as to the property, the limits assigned by the vendor at the time of the sale, and not the ancient boundaries, must be consulted. C. C. 840.

APPEAL from the District Court of Iberville, *Deblieux*, J.

Two suits, commenced by the plaintiffs against Slack, were consolidated in the lower court, and judgment rendered therein "in favor of the plaintiffs, for \$1473 damages, as the difference between the value of the land composing the back tract, or second concession of lots Nos. 26, 27 and 28, and the price paid therefor to the United States by the defendant," and for the possession "of the one half *arpent* front, with a depth of forty, in possession of the defendant, and shown to be a part of lot No. 26." The reconventional demand of the defendant was dismissed, on the ground that the question involved in it was *res judicata*. The defendant appealed.

BULLARD, J. The plaintiffs represent in their first petition (No. 1757,) that they are the owners of a plantation on the bayou Grosse Tête, composed of numbers 26, 27, and 28, about fifteen *arpens* front, and containing $491\frac{1}{4}$ acres, which lots were duly sold in 1826, and patented by the United States to Wilson and Sykes, from whom they derive title. That about the year 1830, the Surveyor General located a pretended claim of Reboul and Franchebois for fifty *acres* front on the bayou instead of *arpens*, and that, in that survey, the former official one under which the patents had been issued, was overlooked or disregarded, and the courses and distances changed. That, by said erroneous location, the said three lots were covered, so that there remained but a small strip of No. 28, and that the said location covered the whole double concession to which the said lots were entitled. That subsequently to said location the act of congress was passed, authorizing the front proprietors to purchase their back lands, and that in virtue thereof, the petitioners were entitled to purchase $491\frac{1}{4}$ acres, in the rear of their front tract; but that they were prevented by the erroneous and improper location of the claim of Reboul and Franchebois. It is represented that Eliphalet Slack, being, at the time, the pretended owner of the claim, purchased the back lands. It is further represented that the double concession was covered by the erroneous location of the claim, so that the petitioners could not enter the back lands to which they are entitled. They aver that, under the circumstances, the purchase so made by Slack enures to their benefit, and ought to be decreed to be for their use. It is averred that Slack well knew that he

had no just right to the back concession. They further allege, that while the said law was in force, they attempted to enter the back lands to which they were entitled, and applied to the proper land office for that purpose, but were refused. It is further alleged that Slack soon afterwards sold the land thus acquired as a double concession, so that the plaintiffs cannot claim the land itself; and that their only relief is in damages, which they pray for. They further allege acts of trespass committed on other parts of their land, for which they also claim damages. In suit No. 1693 the plaintiffs claim title to half an *arpent* in possession of Slack.

The defendant Slack, denies generally the allegations in the petition, and avers that he is the owner of a tract of land of forty acres front on the bayou Grosse Tête, by the depth of forty, bounded above by the land claimed by the plaintiffs; it being the tracts confirmed to Reboul and Franchebois, for twenty-five acres front each. That the tract was afterwards, by competent authority, located, and the location approved. He describes the location and the calls of the original titles. He avers, that in 1836, he entered and purchased 1680 acres, being the quantity he was entitled to purchase as a double concession, which he afterwards sold to A. Hodge. He denies any knowledge of the pretended claim of the plaintiffs to the double concession, either at the time he made the purchase, or at any time previously to the bringing of this suit. He denies the right of the plaintiffs to any back lands, and that the location of the claims of Reboul and Franchebois, which he purchased in good faith, is erroneous. He denies that his land conflicts with any belonging to the plaintiffs on the Grosse Tête. He concludes by praying that the claim for damages may be rejected; that the line of division between the tracts may be settled and established; and that he may be quieted in his title.

The plaintiffs put in an answer to this, regarding it in the light of a reconvention, and averred that the demand of the defendant has already been passed upon, and adjudicated, by the District and Supreme Courts in the case of *Slack v. Orillion*, No. 1574; and they pleaded that judgment as *res judicata*.

The case of *Slack v. Orillion* was twice before this court, (See 11 La. 587, and 13 Ib. 56;) and the first question which

this case presents is, whether the judgment finally pronounced in that case by the District Court, and which was affirmed on appeal, be conclusive as to the title, and forms a *res judicata*.

It is clear that the parties are the same, although their position in relation to each other is changed. The thing in dispute is the same: the plaintiff in that case asserting title under the confirmation in favor of Reboul and Franchebois, and the defendants under the patents for lots No. 26, 27, and 28. But it is argued that the court did not pronounce any final judgment in the case; that both parties were nonsuited, the plaintiff in relation to the principal demand, and the defendant as to his claim under the patents in reconvention.

In order to determine this point, it is necessary to examine the judgment pronounced in the District Court, and which was affirmed here, premising that the *locus in quo* does not appear to have been questioned. The issue was, which party had the best title to the three lots covered by the patents. The District Court, after saying that the plaintiff, not having shown title to the land claimed by him in the defendant's possession, must fail, renders the formal judgment in these words: "It is therefore ordered, adjudged and decreed that there be judgment *against* the plaintiff in regard to the claim set up in his petition against the defendants; and that there be judgment *as of nonsuit* against the defendants in regard to their plea in reconvention in their answer contained." If the judge had stopped at the end of the first clause of the sentence, it would have been, most clearly, a judgment for the defendants, and would have formed a bar to any future action by the plaintiff, founded on the same title. The subsequent part of the judgment, in which the court pronounces upon the reconventional demand, and leaves the question open as to the right of the defendants to recover, under the patents, any part of the land in possession of the plaintiff, does not appear to us to make the first clause any thing less than a final judgment upon the title set up by the plaintiff. The question, however, as to any conflict between the two titles, and, in the event of such conflict, which ought to prevail, under the above restriction, appears to us to have been left open. The court was not satisfied, that the plaintiff in that case was in possession of land covered by the de-

fendant's patents, because the original survey referred to in the patents was not shown. It was for this reason, that the court declined pronouncing finally, upon the right of the patentee to recover any land occupied by the plaintiffs, under the location of the claim of Reboul and Franchebois, although it said that the plaintiff could not recover.

The evidence in this case shows that Slack is in possession of half an *arpent* front, by the depth of forty, of lot No. 26, belonging to Orillion, and embraced in the patent.

Slack has himself asked that the boundary between the parties may be finally established.

It is contended that Slack's possession cannot be disturbed; and the argument is, that both parties claim to hold under Joseph Erwin, to whom all the land, whether covered by the Reboul location, or the patents, at one time belonged; that when all belonged to him, there was a kind of confusion or merger of title, and that the sales were afterwards made without reference to the boundaries as shown by the patents; that Orillion bought a tract bounded by Slack's plantation; and that Orillion must look to his deed, and not to the patents, for the boundary between him and Slack, both holding under Erwin.

Such is undoubtedly the doctrine of the Civil Code; and the only question is, whether it be applicable in this case. Article 840 declares, in express terms, that "when an owner has alienated one of two estates which belonged to him, and the property of any part of it is contested, the limits assigned to it by the vendor at the time of the sale must be consulted. The limits anciently subsisting between the two estates must not be regarded, because the designation which the vendor makes of the metes and bounds, forms new *limits* between the two estates, or between the parts of them which he has sold." *Bourguignon v. Boudousquie*, 6 Mart. N. S. 700.

According to the written admissions of the parties, it appears that Orillion purchased lots 26, 27, and 28, of Joseph Erwin, who had acquired them from the patentees; that Slack is the owner of the claim of Reboul and Franchebois, and that the Reboul claim which is the uppermost one, and conflicts with the patents, belonged also to Erwin by a regular chain of conveyances; that on

the 15th of April, 1826, Erwin sold to Sneed; and that the whole claim now belongs to Slack, who purchased from Sneed.

It becomes important, therefore, to examine the deed by which Orillion became the owner of the three lots. The first sale is from Erwin to Don Louis Rosemond Orillion, of one undivided half of certain land composed of four lots, laid out and sold by the United States on the Bayou Grosse Tête, designated by numbers 30, 31, 32 and 33, on the south side of the bayou; and, further, of the right and title of Erwin by purchase from John Wilson in and to all land laid out and sold by the United States, on the south side of the bayou, lying below lot No. 29 and above lot No. 25, be the same more or less; the said Erwin selling and conveying such part of the lot No. 28, 27 and 26, as may be ultimately decided to belong to the United States, lying between the land originally granted to ——— and lot No. 29. ———

This blank it appears is to be filled up with the claim of Reboul; it being doubtful at the moment which was the upper claim, that of Reboul or that of Franchebois. It must be remarked that the two claims had not at that time been located, and it was doubtful whether they would not interfere with the purchase made by Wilson and Sykes of the United States.

The sale from Erwin to Sneed is not in the record: but by looking at the deed from Sneed to Slack, we discover that he purchased from Sneed forty *arpens* front, by forty in depth, on both sides of the bayou Grosse Tête, bounded above by lands of Joseph Erwin, and below by lands of the widow and heirs of Stephen Ross.

Thus Slack is bounded above by Erwin, the vendor of Sneed; and Orillion deriving title from the same source, is bounded below by the claim of Reboul.

Slack purchased one undivided half of the land from the succession of Cutter, and it is described in the *procès verbal* as having forty *arpens* front, by forty in depth, bounded above by Orillion, and below by the United States.

It appears to us therefore, pretty clear that Erwin, the common vendor of the parties, did not intend to sell to Sneed more than forty *arpens* front, bounded below by Ross, and above by his own land acquired from Wilson; and that he intended to sell to

Orillion so much of Nos. 26, 27, and 28, as did not interfere with his sale to Sneed. The boundary line, therefore, between the parties would be forty *arpens* above the upper line of Ross' land. Such appear to be the true boundaries according to the titles; and it is clear, that Slack could not, by a subsequent location and survey, giving to himself *acres* instead of *arpens*, materially affect the rights of the parties; nor could Orillion, disregarding the boundaries set forth in his deed, insist upon the patent lines as the true division line between him and Slack, claiming from a common vendor. When the case of *Slack v. Orillion* was before this court, none of these questions were raised. The rights of the parties were considered as if each had derived title directly from the respective grantees, instead of holding under a common author; and, in that view of the case, it appeared to us that Slack, under the location of the Reboul claim, could not recover any part of lots No. 26, 27, and 28, which were covered by the patents from the United States. The view now taken, and the evidence now exhibited present the case in a very different light; and the question recurs, are the parties precluded by the former judgment? That judgment appears to us conclusive against Slack; and that, under the location of 1830, he cannot claim any land in possession of Orillion under the patents. But the present action may well be regarded as one of boundary subject to that restriction, and if the evidence showed satisfactorily where the forty *arpens* front sold by Erwin to Sneed, would terminate on the bayou, we should think ourselves authorized to declare that to be the true boundary between the two tracts. But nothing shows where the survey of those forty *arpens* is to begin, or, in other words, where the land of Ross ends. Upon the question of boundary we cannot, therefore, act definitively.

Another question besides that of damages, reserved by the agreement of the parties, still remains to be examined, to wit: whether Orillion be entitled to recover damages in lieu of the back concession, which was purchased by Slack under the acts of Congress.

If the plaintiff had applied to the proper office in due time, and exhibited his patents as evidence of his being a front proprietor within the meaning of the act of Congress, and the commissioners

had awarded a preference to Slack under his title, and the plaintiff had offered to refund to Slack what he had paid, it is probable that, on his title being decided to be the best, he might have been decreed to be the true owner of the back tract, on paying the price to Slack. But it does not appear that any application was made by Orillion to enter the land; and Slack in the mean time with an apparent title to the front tract, purchased of the government the land adjoining in the rear, and sold it in good faith, for aught that appears to the contrary. There is nothing to satisfy us that Orillion ever had any intention to apply for the back lands, except his inquiring of the Surveyor General whether there was any land in the rear subject to entry; and he appears to have been satisfied with the answer that there was not. It cannot, therefore, be said that he was prevented by Slack from prosecuting any right he might have; and we think he is not entitled to the damages awarded him by the court below.

It is therefore ordered and decreed that the judgment of the District Court be avoided and reversed; and it is further ordered that the case be remanded for further proceedings upon the questions reserved by the parties, and to ascertain and establish the division line between the parties according to the opinion herein expressed; and that the appellee pay the costs of the appeal.

Labauve, for the plaintiffs.

G. B. Taylor, for the appellant.

NARCISSE LANDRY v. GILMORE F. CONNELLY.

Where the purchaser of property of a succession, sold by order of a Court of Probates, fails to comply with the terms of the sale, that court has authority to compel a compliance, or to order the property to be sold anew *à la folle enchère*.

An obligation, though null and void *ab initio*, may be ratified or confirmed expressly or tacitly, verbally, in writing, or by acts manifesting clearly such an intention, or even, in some cases, by silence. C. C. 2252.

The execution of an act under private signature, by the purchaser of property at a succession sale, resold by order of the Probate Court on his failure to comply with

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the terms of sale, by which he consents to lease or buy the property from the second purchaser, is an acquiescence in the judgment divesting his title.

No appeal or action of nullity will lie against a judgment, which has been voluntarily executed by the party against whom it was rendered. C. P. 567, 612.

APPEAL from the District Court of Ascension; *Nicholls, J.*

The petitioner, Narcisse Landry, represents, that on the 18th of December, 1835, one James Anderson purchased, at the probate sale of the succession of Louis Marcellin Comès, a certain lot in the town of Donaldsonville; that Anderson having failed to comply with the terms of sale, the property was ordered by the Court of Probates to be resold for cash, when, on the 18th of April, 1839, he, Landry, became the purchaser; that subsequently, on the 11th of May, 1841, Anderson leased the property from him, acknowledging him as its lawful owner, and ratifying and confirming his title thereto; that Anderson held the property, as such tenant, till the 6th of May, 1842, when he illegally and fraudulently sold the same to the defendant. The petition further states, that the defendant was aware of the facts above stated, at the time of his purchase; that he was a party to the fraud practised by his vendor, and obtained the sale and possession fraudulently. The ground and improvements are alleged to be worth \$700; and the plaintiff claims damages to the amount of \$500, for the detention of the property since the 12th of May, 1842, and the slander of his title. The petitioner concludes with a prayer, that his title to the property may be confirmed, the sale to the defendant rescinded, and for \$500 damages.

Connely answered by a general denial. He specially denied that the plaintiff acquired any title by the sale, under the order of the Court of Probates, made on the 18th April, 1839, which he avers was null and void, the court being without jurisdiction. He alleges that the contract of lease signed by his vendor was made through error both of law and fact, and is, consequently, null; avers that Anderson, his vendor, acquired all the right and title of the succession of Comès by the sale of the 18th December, 1833; and concludes by praying that he, the defendant, may be declared the owner of the property.

The evidence introduced on the trial, will be found in the opinion of the court.

Duffel and M. Taylor, for the appellant. The adjudication to the plaintiff transferred the property to him. Civil Code, art. 2589. The proceedings were properly in the Probate Court. If any nullity originally existed it was cured by the subsequent ratification by defendant's vendor. Code of Pract. art. 612. Civil Code, art. 2252. Toullier, *De la Preuve Littérale*, ch. 6, sect. 1, § 5, Nos. 491, 493, 502, 503, 509, 513, 517, 523. The right to attack the act *sous seign privé* between Anderson and the plaintiff, is personal to Anderson, and cannot be exercised by the defendant. Toullier, *Des Contrats*, chap. 5, Nos. 564, 566. The sale from Anderson to the defendant is absolutely null. Civil Code, art. 2427. Paillette, 1599, note a, No. 3.

Ilisley and Nicholls, for the defendant. The sale to the plaintiff was null, the Court of Probates being without jurisdiction. *Lafon's Ex'rs v. Lafon*, 1 Mart. N. S. 705. 6 Ib. N. S. 611. 6 La. 441. The lease executed by Anderson was not binding on him, having been entered into through error in law. 5 Mart. N. S. 255. Nor did it amount to a confirmation of the sale to plaintiff, not containing the essentials of such a ratification. Civil Code, art. 2252.

SIMON, J. The plaintiff is appellant from a judgment, rendered on the verdict of a jury, confirming and maintaining the defendant in his title to the property in controversy, as acquired by him from one James Anderson. The judgment complained of was rendered, after an unsuccessful attempt on the part of the plaintiff to obtain a new trial.

The facts of the case, as disclosed by the evidence, are these. On the eighteenth of November, 1835, James Anderson became the purchaser, at the public sale at auction of all the property belonging to the succession of Louis Marcellin Comès, (which sale was made by order and under the authority of the Court of Probates of the parish of Ascension,) of a lot of ground situated in the town of Donaldsonville, for the price of four hundred dollars, which, according to the conditions of the sale, was to be paid in three equal instalments to become due in March 1836, 1837, and 1838, the purchasers giving good and approved security *in solido*, with special mortgage reserved on the property sold, and paying ten per cent interest per annum on all sums remaining unpaid

at maturity. On the margin of the *procès verbal* of adjudication, was attached with a wafer, the following writing: "I will be security for Mr. Anderson for the lot where he lives, and will sign the note when made. T. C. Nicholls." On the seventh of March, 1839, a rule was obtained by the widow and heirs of Comès, from the Court of Probates of the Parish of Ascension, on James Anderson, to show cause within ten days from the service thereof, why the lot of ground and improvements adjudicated to him, should not be resold ten days after the customary notices, at his risk and costs for cash, on his failing to comply with the terms of the first adjudication, by paying the purchase money with interest; which rule appears to have been regularly served on the defendant Anderson. Anderson having failed to file any answer to the rule within the legal delay, a final judgment was rendered, and signed against him on the 5th of April, 1839, making the rule absolute, and ordering the property to be resold at public auction, for cash, according to the demand of the applicants. On the 18th of the same month, the property in dispute was offered for sale at public auction, according to the terms of the aforesaid judgment, and was finally adjudicated to the plaintiff in that suit, for the sum of \$480 cash.

It appears further, that on the 11th of May, 1841, a certain act, under private signature, was executed between James Anderson and Landry, purporting to be a lease of the property in controversy, and a promise of sale from Landry to Anderson. This act was signed by both parties, in two originals, one of which was kept by each, and contains the following stipulations: "Narcisse Landry will lease to James Anderson, the lot of ground, &c. by the said Anderson now occupied, for the sum of fifty dollars per annum, the lease dating back from the last of March, 1841, and terminating on the last of March, 1842, &c., and further, I, Narcisse Landry, do hereby promise and bind myself upon the payment of the said sum of sixty dollars, being for the rent then due, and for the additional sum of \$480, to be then, in March, 1842, paid by Anderson in cash, to make and pass to the said Anderson, a full and absolute title to the said lot, conveying to him all the rights which I have acquired thereto by purchase at a probate sale dated the first of April, 1839." Anderson continued to oc-

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copy the property under the lease; and on the sixth of May, 1842, he sold and conveyed the same to the defendant Connely, for the sum of one hundred dollars cash, the vendee assuming all the obligations of the vendor towards the estate of Louis Marcellin Comès.

The parol evidence shows, that before the 12th of May 1842, (the witness is uncertain whether it was before the defendant had already concluded the purchase, or only had it in view, but inclines to the belief that he had not yet made the purchase,) defendant had a conversation with the witness, Nicholls, (the subscribing witness to the lease,) in which said lease was spoken of, and in which he thinks he told the defendant how the transaction had taken place. Another witness proves that, on the 24th of April, 1842, the defendant offered, in his presence, to purchase the property from the plaintiff; that the plaintiff replied that he would sell the lot to Anderson for the price he had given for it, and the rent which Anderson owed him; but refused to sell to any other person.

The parish judge testifies that previous to the sale from Anderson to Connely, the latter went to his office to examine the claims of the plaintiff under the adjudication made to him at the probate sale; that they were exhibited to him, and that he examined them; but the witness cannot say positively whether the lease was then made the subject of conversation. It is also admitted by the defendant that he had a knowledge of the plaintiff's claim under said adjudication, previous to his purchase from Anderson.

Under the pleadings in this suit, and the above synopsis of the facts and circumstances disclosed by the evidence, several questions have been raised, and divers authorities quoted, as they seemed to favor the pretensions of the respective parties. The defendant's counsel has contended, that the plaintiff never acquired any title to the property in dispute, under the adjudication made to him at the sale made by order of the Court of Probates; as that sale, and all the proceedings by virtue of which it was made are null and void, for want of jurisdiction in the said court: that Anderson never was legally divested of his title thereby; and that the contract of lease, relied upon by the plaintiff, was made in error of law and fact, and is, therefore, null and void.

On the part of the plaintiff, it has been insisted, that the proceedings had by the Court of Probates were legal, and within its jurisdiction; but that, even supposing them to have been null, the nullity was cured by the defendant's vendor, who ratified the plaintiff's title, and acquiesced in the judgment on which it is based.

The view we have taken of the question of ratification and acquiescence, as resulting from the lease and promise of sale produced by the plaintiff, and other circumstances of the case, renders it unnecessary to examine the question, (which perhaps could not be inquired into collaterally in this suit,) relative to the validity of the judgment of the Court of Probates on which the plaintiff's title is based, and to inquire fully into its jurisdiction in rendering said judgment. But we cannot forbear remarking, that it does not appear to us that the Court of Probates was utterly without jurisdiction, in granting the rule and ordering the second sale of the property in controversy. The rule had for its main object to compel the purchaser to comply with the conditions of the sale, or in case of his failure to do so, to cause the property to be sold anew, *à la folle enchère*. He was cited for that purpose and as one of the consequences of the purchasers not complying with the terms of the sale, was to bring the property back to the succession; and, as being *succession property*, partly owned by *minors*, it could not be sold in any other manner but by virtue of an order of the Court of Probates. It seems to us that the very object of the proceeding being to complete a sale previously ordered by the Court of Probates, that court may well be considered as the tribunal most competent to carry into full effect its own orders. 6 La. 440. Again, the conditions of the first sale not having been complied with, it was undoubtedly within the province of the probate court to order the property to be resold. So, in the case of *Towles v. Weeks*, 7 La. 312, the rule obtained by the plaintiff was made absolute, and the defendants were required to comply with the terms of sale; or, in default thereof, the property would be *resold on their account*. On the appeal taken from that judgment to this court, no doubt was entertained as to the jurisdiction of the probate court; and the decree appealed from was affirmed.

But supposing the proceedings to have been irregular, and the probate court without jurisdiction, the question presents itself,—did not Anderson ratify the sale made to the plaintiff? and did he not acquiesce in the judgment which divested him of his title under the first adjudication?

It is first proper to notice that the defendant, in purchasing from Anderson, knew that he was buying a *litigious right*. He was aware that the plaintiff had acquired a title to the property under a judgment of the Court of Probates; that the first adjudication had been set aside; and that his purchase would subject him to a judicial controversy. He was not an innocent purchaser or third party; and we are induced to believe that he was also made acquainted with the lease and promise of sale which had been executed between the plaintiff and Anderson. If so, the defendant acted in bad faith. His conduct shows a design on his part to obtain a title to the property from either of the parties: for after attempting to get it from the plaintiff to the prejudice of Anderson to whom it was to be sold by Landry, he applies to Anderson, and prevails upon him to pass him a sale to the prejudice of the plaintiff. We must, therefore, consider ourselves bound to hold the defendant to the full effect and consequences of the acts of Anderson, his vendor; and if it be true that the latter had previously acquiesced in the judgment ordering the second sale, the defendant cannot recover.

The facts from which the ratification or acquiescence relied on by the plaintiff can be inferred, have already been fully stated. They consist mainly in Anderson's consenting to lease and purchase the property from the plaintiff, with a full knowledge of the origin and nature of the plaintiff's title; and to this, it may perhaps be added, that being a resident of the parish in which the property is situated, he suffered it to be sold after ten days public notice or advertisement, without making any opposition to the sale. Now, under the 2252d. art. of the Civil Code, "in default of an act of confirmation or ratification, it is sufficient that the obligation be voluntarily executed, subsequently to the period at which the obligation could have been validly [by the act required in the first paragraph of the article] confirmed or ratified." Hence it is argued, that Anderson, having recognized the plaintiff

as the legal owner of the property in dispute, under the second adjudication, has voluntarily consented to the execution of the judgment under which the adjudication was made, and that this amounts to a sufficient confirmation or ratification of the sale. Toullier, on the 1338th art. of the Nap. Code, vol. 8. No. 491, after giving the definition of the word ratification, which he considers as synonymous with approbation, recognizes two sorts of ratification, the second of which is: "*Celle par laquelle nous approuvons un contrat ou autre acte auquel nous avons concouru, ou auquel nous avons été appelés, mais qui était susceptible d'être attaqué pour des vices réels, ou apparens, de nature à en faire prononcer la nullité ou la rescision.*" This last sort of ratification is the one provided for in the 1838th art. of the Nap. Code, and in the 2252d of our Code, and in one, as well as the other, "*peut être faite expressément ou tacitement, verbalement, par écrit, ou par des faits qui manifestent clairement notre volonté quelquefois même par le silence.*" See also Toullier, vol. 8, Nos. 493, 502, 503, 509, 513, and 517. So, in the case of a minor who has given a receipt for the price of property illegally alienated during his minority, the receipt is considered as a ratification of the act, though originally null. Several instances of express and tacit ratifications are found in our jurisprudence, in which this court, in accordance with the principles recognized by Toullier, and contended for by the appellant, has uniformly decided that an act may be approved or ratified by implied or tacit ratification, though null and void *ab initio*. 10 Mart. 726. 5 Ib. N. S. 165. 6 La. 604. 7. La. 17. 17 La. 454.

An attentive examination of the second branch of the question, has convinced us that Anderson's consent to lease the property and to buy it from Landry, may also be considered as an acquiescence in the judgment which divested him of his original title. Reference is made, in the act under private signature, to the adjudication made to Landry. Anderson there agrees to purchase the very property which had been adjudicated under the judgment now complained of, and it appears to us that there cannot be a stronger case of acquiescence than the one under consideration. Under arts. 567 and 612 of the Code of Practice, no appeal can be taken from, nor can an action of nullity be brought against a

judgment which has been acquiesced in by a party who has suffered it to be executed. See also 2 La. 265. Toullier, vol. 10, No. 106, says : "*Acquiescer à un jugement, c'est en approuver les dispositions, et consentir qu'elles reçoivent leur exécution. Cet acquiescement peut se faire d'une manière expresse ou tacite : tacite, lorsqu'il résulte clairement et sans équivoque de ses actions que son intention est d'acquiescer au jugement.*" Merlin, Répertoire, *verbo* Acquiescement. Same author, Questions de Droit, *verbo* Acquiescement, § 3, in which this question is fully investigated. Favard de Langlade, *verbo* Acquiescement. Now, can it be seriously controverted that Anderson, who had in view the lease and purchase of the very property which he had been divested of by the judgment which was made the basis of Landry's title, did really recognize its validity, and approve its execution? Does not this act on his part, independently of the other strong fact that he suffered the property to be sold without making opposition, imply clearly the intention of abiding by that judgment, and of consenting that its execution should be maintained? An affirmative answer to this last question necessarily brings us to the conclusion, that Anderson's acts involve a positive renunciation of the means and exceptions which he might have opposed to the plaintiff's title, and that the litigious right or title by him sold and transferred to the defendant, must be defeated.

It has been urged that Anderson, when he signed the lease, was laboring under an error of law, and we have been referred to the case in 5 Mart. N. S. 265. We understand the counsel to mean that Anderson was not aware of his legal rights; and that he did not know that he could attack the proceedings and the sale made under them to the plaintiff on the score of nullity. There is, however, no evidence in the record showing any error on the part of Anderson, or that such error was the only or principal cause of his contract. Civil Code, art. 1840. This cannot be presumed; and it seems to us that this proposition sounds somewhat in contradiction with the position taken by the counsel in the argument of this cause, that Anderson did not answer to the rule served upon him, and did not think proper to resist it because he knew that the probate court, being without jurisdiction, the proceedings would be null and void. This would show

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that he was sufficiently aware of the nature and extent of his legal rights. This allegation of error cannot avail the defendant.

Upon the whole, we must say, that the verdict of the jury is manifestly erroneous, and that it should have been in favor of the plaintiff; but as under the principles lately recognized in the case of the *Planters Bank of Mississippi v. Watson & Walker*, decided in the Western District, justice does not seem to require that this case should be remanded for a new trial before another jury; this court, being in possession of all the facts adduced in evidence by both parties.

It is therefore ordered and decreed that the judgment of the District Court be annulled and reversed, and that the title of the plaintiff to the property in dispute be confirmed; that he be put in possession thereof; and that the sale made by Anderson to the defendant be cancelled, so far as it affects said plaintiff's rights. And it is also ordered and decreed that the defendant pay the costs in both courts.

CRAFTS J. WRIGHT v. JOHN J. CAIN, Marshal, and others.

Where one whose property has been seized under an execution against a third person notifies the marshal or sheriff that the property seized belongs to him, he will not, by omitting to take legal measures to prevent the sale, lose his recourse against the officer.

APPEAL from the District Court of the First District, *Buchanan J.*

McKinney, for the appellant. On behalf of the plaintiff, the case was submitted without argument.

BULLARD J. This is an action to recover of the Marshal of the city of Lafayette and his sureties the value of a flat boat and load of coal belonging to the plaintiff, which he alleges was wrongfully and illegally seized and sold by the said Marshal, as the property of Pomeroy & Co. Judgment was rendered for the plaintiff, and the defendant Cain has appealed.

It is clearly shown that the coal and boat were the property of

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the plaintiff, and that in virtue of an execution on a judgment for forty-three dollars and sixty-eight cents and costs, against Pomeroy & Co. at the suit of McKean, about 3000 bushels of coal were seized; and although the Marshal was formally notified that the coal was the property of the plaintiff, he persisted in selling it to satisfy the writ in his hands.

It is contended, in this court, that although the sale was advertised, no steps were taken to arrest it by any legal means, and that it is not sufficient to give notice that the property did not belong to the defendant in the execution. The writ in the hands of the Marshal authorized him to sell only the property of Pomeroy & Co. and after being notified that the property seized belonged to the plaintiff he proceeded to sell it, at his peril. The plaintiff may have been unable to give security for an injunction; and we cannot consider him as having lost his recourse upon the marshal by declining to take any legal steps to prevent the sale. See Van Winkle's case recently decided.

Judgment affirmed.

A. A. MASSIAS v. WILLIAM A. GASQUET and others.

A payment made in error may be recovered back, where such error, though the fault of the plaintiff, has not injured the party to whom the payment was made.

APPEAL from the Commercial Court of New Orleans, *Watts, J. C. M. Conrad and Eustis*, for the plaintiff.

Wharton, for the appellants.

MORPHY, J. The plaintiff, a paymaster in the United States' army, seeks to recover back from the defendants the sum of \$629,50, as having been paid through error, on an account purporting to be the account of one W. Martin, a lieutenant of infantry, for his pay and emoluments from the 1st of October, 1839, to the 30th of June, 1840. It is alleged that the plaintiff informed the agent of the defendants who presented this account, that although it was not yet due, he was willing to pay the same before

its maturity, because he had confidence in the defendants' honor; that he accordingly paid the amount a few days before the 30th of June, 1840, and took a receipt therefor; that shortly after, the plaintiff discovered that the pay of W. Martin had been stopped, and that at the time of the payment he was in possession of a circular notice addressed by the Paymaster General of the army to the paymasters of the several districts, informing them that said Martin had resigned his commission on the 31st of May, 1840, and directing them to make no payment to said Martin after the receipt of the letter; that in point of fact, the government was not indebted to the said Martin in any sum whatever, at the time of the payment made to the defendants, and that as the money was paid in advance, and after the receipt of the circular notice from the Paymaster General, the plaintiff cannot charge the same in his accounts with the government. The petitioner avers that the payment to Gasquet, Parish & Co. was made in error, and under the belief, and with an understanding, express and implied, on their part, that the money should be refunded in the event of the account not being correct, or the payment thereof disallowed by the government. The defendants pleaded the general issue. There was a judgment below in favor of the plaintiff, and this appeal was taken.

The record shows, that on the 21st of October, 1839, W. Martin transferred his pay accounts, for \$638,50, to Messrs. Doak & Timms, near Fort Towson; who, in their turn, transferred them to the present defendants, in part payment of a note, and that the amount was credited to the transferrors on defendants' books on the 18th of November following; that, on the 27th of June, 1840, the plaintiff paid the amount in question, and that on the 20th of July he went to the counting-house of defendants, and informed them that he had made the payment in error, as he had since discovered that at the time he made it, he had a circular notice from the department not to pay any money to Martin; and that the defendants refused to refund the amount thus paid to them. There is an admission on record that W. Martin had already received his pay for the time charged in the account, or pay roll, and that no portion of the claim was due to him by the government. Under this state of facts, about which there is no dispute, it is obvi-

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ous that the sum sought to be recovered back, has been paid in error. The plaintiff believed that he was discharging a real and legitimate claim against the government. The supposed correctness of the account was the principal cause, or motive, which induced him to pay it. Had he thought of the circular notice in his possession at the time, or had he known that the claim was unfounded, he would, undoubtedly, have refused to pay the account. He was, therefore, acting in error. Every payment presupposes a debt; and whatever has been paid without being due, can be recovered back. Civil Code, arts. 2129, 2280. The existence of the debt was moreover impliedly guarantied by the defendants. They are under the same obligation to refund, as if, instead of receiving payment of their claim, they had transferred it for a valuable consideration, and were now sued for reimbursement, on the ground that the debt transferred had no existence. Civil Code, arts. 2616, 2279. It has been urged, that as the plaintiff himself committed the error, by forgetting the circular notice in his possession, he should suffer the loss. This would appear reasonable enough, had it been shown that this act or fault of his had injured the defendants, by inducing them to forego some acquired right, or had in any way changed their position; but such is not the case. They had, long before received this claim, in payment from Doak and Timms. When, on the 28th of July, 1840, they were informed of the error, and of the invalidity of the claim, they stood in the same situation as if no such error had been committed. They could have exercised their recourse against their assignors, Doak and Timms, in the same manner as if they had regularly presented the account for payment on the 30th of June, 1840, and had then been told that it could not be paid by reason of the circular received, and the non-existence of any claim. In the absence of any evidence on the subject, it would be unreasonable to assume that the short delay of twenty days, which intervened before the discovery of the plaintiff's mistake, lessened or impaired in any way, the recourse of the defendants against their transferors, Doak and Timms.

Judgment affirmed.

ABRAHAM VAN WYCK v. HORATIO W. HILLS.

Where one who certifies the transcript of a judgment from another state, styles himself in the body of the certificate, the clerk of the court, and signs it as such, all of which is attested by the seal of the court and the certificate of the Chief Justice or Presiding Magistrate, no further evidence will be necessary to establish his official capacity.

Where the laws of another state which should govern the case, are not in evidence, our own must prevail.

In joint actions all the debtors must be sued, and must remain in court till the end of the suit; and the judgment must be against each for his virile portion.

APPEAL from the District Court of the First District; *Buchanan*, J.

J. Claiborne, for the plaintiff.

G. & H. H. Strawbridge, for the appellant.

MARTIN, J. The defendant is appellant from a judgment sustaining an order of seizure and sale, obtained on a judgment of a court of the State of Tennessee. It was attempted to be set aside on the following grounds;

1st. That nothing shows the official capacity of the clerk attesting the transcript. Citing 18 La. 59.

2d. Nor that of the Magistrate or Judge, who attests the clerk's official capacity and that his certificate is in due form of law. Citing 2 Mart, N. S. 377, 10 La. 377.

3d. That the defendant was discharged by a *remittitur* to his co-defendant in Tennessee.

4th. That the judgment is not *in solido*, and cannot be executed or enforced against one defendant only.

The official capacity of the person who certifies the transcript, is proved by his taking the style of clerk of the court in the body of the certificate, subscribing it as such, all which is attested by the seal of the court, and the Chief Justice or Presiding Magistrate. Thomas Mancy who attests the clerk's capacity and that his certificate is in due form of law, styles himself, "one of the Circuit Judges of the State of Tennessee, and assigned to hold the Circuit Courts in the sixth Judicial Circuit, and sitting and holding said Circuit Courts for the County of Davidson, at the Court

"House in Nashville, in said Circuit." The Judge, therefore, informs us by his certificate, and the transcript shows, that he is sole Judge of the Court which rendered the judgment, and consequently the Chief Justice or Presiding Magistrate thereof. It does not appear that there was a *remittitur* against Larkin F. Wood, who was one of the three original defendants; but a mere entry that the plaintiff did not intend farther to prosecute the suit against him. The Sheriff's return shows that he had never been served with any process, as he could not be found. The record shows that the present defendant, and his then co-defendant, were sued as merchants and partners in trade; that they pleaded payment only, and that there was a verdict and judgment against them. It is contended that the judgment is a joint one only, not one *in solido*. As the laws of Tennessee are not in evidence in this case, we must test the nature of the judgment by the laws of this State. According to these, the judgment is not a joint one, for there were three obligors sued. The action was dismissed as to one of them. In joint actions all the debtors must be sued, and must remain in court till the end of the suit. *Thompson v. Chrétien et al.*, determined at Opeloussas, September, 1842. 3 Robinson, 26.

The petition shows that the suit was brought on a mercantile contract, entered into by a firm composed of three persons; that one of them could not be found; and that the action proceeded against the other two. They did not deny the contract, but relied on a plea of payment, which was found against them; and a jury found a verdict for a balance in favor of the plaintiff. Testing, therefore, the judgment by the pleadings, we cannot view it as a joint one; for in such a judgment each defendant must be condemned to pay his *virile part*. The judgment therefore was properly treated below as one *in solido*, being on a mercantile contract. *Melançon's Heirs v. Duhamel*, 3 Mart. N. S. 7.

Judgment affirmed.

VICTOR MONTILLY v. HIS CREDITORS.

Where the funds of an insolvent estate have remained on deposit in a Bank, in which they were placed by the syndic in pursuance of law, any loss resulting from the depreciation of the notes of the bank, must be borne by the creditors; but where the funds so deposited were withdrawn by the syndic, without any order of court, when the notes of the bank were *at par*, and were re-deposited when depreciated, he will be made to account to the creditors for the value of the notes *at par*. He should have left the funds on deposit, until ordered to pay them out. Act of 13 March, 1837.

APPEAL from the District Court of the First District, *Buchanan, J.*

Pilié, for the plaintiff in the rule.

Grivot & Castera, for the appellants.

MORPHY, J. On a suggestion being made to the court below that R. A. Lefebvre, syndic of the creditors of Victor Montilly, had refused to comply with a decree of the said court, adjudging \$1250 to one François Roubieu as a privileged creditor, a rule was issued against the said syndic, and Joseph Perillat his surety, to show cause why they should not be condemned to pay to the said F. Roubieu the said sum of \$1250, in legal currency, or in default thereof, why a writ of execution should not be forthwith issued against them both *in solido*.

The defendants in the rule answered, that it was taken for the purpose of vexing and harassing them; as the said F. Roubieu well knew that the funds of the estate of Montilly, received by the syndic, were deposited in the Improvement Bank according to law, at a time when it was considered good and solvent, and that without any fault on his part, and when the public least expected it, the said bank stopped payment. They further allege that they have always been ready and willing to pay said Roubieu in a check on the bank, which has been refused. They pray for a dismissal of the rule at Roubieu's costs; and that he be ordered to receive the syndic's check on the Improvement Bank, for the amount coming to him. The rule having been made absolute, the defendants appealed.

Whether a rule on the syndic and his surety, to show cause,

was the proper proceeding or not, to render them liable *de bonis propriis*, we are not now to inquire, as no objection to it was made below, and both the syndic and his surety joined issue on the merits of the rule.

The evidence shows that in January, 1842 there was a sum of \$1434,97 belonging to the estate, in the Improvement Bank; that, without any order of court, this amount was withdrawn by the syndic by two checks, one of the 22d of January, for \$800, and the other of the 28th of the same month, for \$634,97; that when the funds were thus withdrawn the Improvement Bank notes were current and received by the other banks; and that after the 21st of February following, and when the notes were at a large discount, and were refused by all the other banks, the syndic made a special deposit in the bank of its own notes. It has not been satisfactorily shown that the funds thus withdrawn by the syndic remained in his hands, and were the same as were re-deposited some time after, when the notes had considerably fallen in value. It further appears that R. A. Lefebvre had an account in the bank, kept in the name of R. A. Lefebvre & Co. Under such circumstances, we cannot say that the court below erred in the conclusion to which they arrived. Had the funds of the estate remained in deposit at the bank, their depreciation would have been a loss to be borne by the creditors, and Roubieu could hardly have refused to receive a check in payment. But the syndic having withdrawn these funds when they were current in all the banks, and when, therefore, he could use them to as much advantage as a legal currency, he cannot complain if he is now made to account with the appellee for the par value of the notes. He should not be permitted to profit by his own wrong. It was his duty to have the funds of the estate deposited in the bank until he was ordered to pay them over. B & C. Dig. p. 498.

Judgment affirmed.

Small v. Zacharie and another.

THE UNION BANK OF LOUISIANA v. SAMUEL MARTIN and wife.

APPEAL from the District Court of Iberville, *Nicholls, J.*

Labauve, for the appellants.

W. E. Edwards, for the defendants.

MARTIN, J. The Bank appeals from a judgment, sustaining the opposition of the appellees to the homologation of a sale of property under an execution on the motion of the appellant, and setting aside the sale. The sale was set aside, on the ground that the Sheriff ought to have accepted the sureties of Harrolson, to whom the land had been adjudicated as the last and highest bidder, for one thousand dollars; and that the Sheriff improperly adjudicated it to the plaintiff for two hundred dollars. The question turned on the sufficiency of the sureties offered by Harrolson, and the court thought them sufficient. Several witnesses were examined on this point, and the testimony is somewhat contradictory; but it does not appear to us that the court erred, in concluding that it preponderated in favor of the sufficiency of the sureties.

Judgment affirmed.

JOEL SMALL v. JAMES W. ZACHARIE and another.

Where the answer admits that a portion of the amount claimed is due, judgment may be obtained therefor, on motion, without a trial; and the case be left open, as to the part in dispute.

Where respondents allege, "that they tendered to the plaintiff about, or at the maturity of the note, the sum" which they admit to be due, but without stating the manner in which the tender was made, or showing that the money was deposited as required by law, or denying the amicable demand and refusal to pay set forth in the petition, the plea will be considered informal and insufficient, and interest be allowed on the whole amount until finally paid.

The rule that a party, wishing to avail himself of the admissions of his adversary, cannot divide them, but must take them entire, does not apply to admissions in the pleadings; but only to answers to interrogatories (C. P. art. 356,) or to judicial

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confessions made according to art. 2270 of the Civil Code. Thus, where the debt is acknowledged but, a tender of the amount alleged, the plaintiff will be exempted from the necessity of proving his claim; but as a matter of defence, the tender must be established by legal evidence, like any other fact tending to show a discharge from the obligation sued on.

Defendants admitting a part of the debt sued for to be due, pleaded a tender; and plaintiff having moved for a judgment for the amount so admitted, it was rendered without a trial, for that sum, with costs, leaving the case open as to the balance of the claim: On appeal *held*, that as to the costs, the judgment was premature; that being thrown by law on the party cast, they should not be taxed before the final determination of the suit; and that, should defendants prove the tender, and establish the other part of their defence, the costs must fall upon the plaintiff.

APPEAL from the City Court of New Orleans, *Collins, J.* The defendants, who were sued on their promissory note for \$989,88, with costs of protest, and interest at five per cent, from its maturity, alleged a failure of consideration as to a part of the note, and represented "that they tendered to plaintiff about, or at the maturity of said note, the sum of \$539,88, being all that in justice they were bound to pay, but that the said plaintiff refused to accept the same." On motion of the counsel for the plaintiff, judgment was rendered below, without trial, for the \$539,88 admitted to be due, and for the costs of protest and of the suit, leaving the case open as to the balance of the claim. From this judgment the defendants have appealed.

J. W. Smith, for the plaintiff.

T. Stidell, for the appellants.

SIMON, J. The defendants are appellants from a judgment condemning them to pay a part of the plaintiff's claims, founded on a promissory note of the amount of \$989,88, on which they allege that they owe only the sum of \$539,88, which, they say is all that in justice they are bound to pay to the plaintiff, to whom they tendered said amount about, or at the maturity of the note sued on. The balance of the note is disputed on divers grounds set up in the defendants' answer, going to show a want or failure of consideration for the same to the amount of \$450.

Judgment was rendered below for the sum undisputed, with interest and the costs of the suit; and the case remained open for the balance of the claim.

The appellants complain, that the judgment was rendered against

them *ex parte*, and without evidence. They contend that as the admission contained in their answer was the only foundation of the judgment, that admission must be taken entire and cannot be divided; and that as it was accompanied by the allegation of a tender of the sum due at the maturity of the note, they cannot be made liable in their answer for any thing but the principal, and neither for interest, or costs.

There being no dispute as to the amount admitted to be due by the defendants' answer, judgment was properly rendered therefor, on the motion of the plaintiff's counsel. No trial was required for the sum admitted by the defendants. *Parsons et al. v. Suares*, 9 La. 412.

With regard to the interest, we think it was also properly allowed. Supposing that the admissions on which the judgment is based could not be divided, the plea of tender relied on by the appellants, is so informal, irregular and insufficient, that it cannot be taken as a compliance with the requisites of the law. Code of Practice, arts. 404, 407, 413, 415. Civil Code, arts. 2163, 2164. The manner in which the alleged tender was made is not stated, nor is it shown that the money was ever consigned as required by law; and the answer does not contain any denial of the amicable demand and refusal to pay set forth in the petition.

We must, however, remark, that under the doctrine recognized by this court, in *Diggs et al. v. Parish et al.*, 18 La. 8, the defendants could not, perhaps, be dispensed from proving their allegation of a real tender. As a matter of defence, it should be established by legal evidence, as well as any other fact tending to show their discharge from the obligation sued on, or that they are not liable to pay the whole, or part of the plaintiff's demand.

With respect to the costs of the suit, we are of opinion that the judgment appealed from was premature. Those costs, being thrown by law upon the party cast, should be the result of the final decision of the cause; and *non constat* that the defendants may not yet plead and prove the real tender of the amount by them admitted to be due in the manner prescribed by law, which, if they succeed in establishing the other branch of their defence, will necessarily throw the costs upon the plaintiff. As a general

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rule, the costs should not be taxed before a final determination of the suit.

It is therefore ordered and decreed, that the judgment of the City Court be affirmed in all its parts, except with regard to the costs of the suit in the lower court; which are to remain undecided upon until the final decision of the suit; and that the appellee pay the costs of this appeal.

AUGUSTIN B. SEGUR v. DAVID G. HILL.

Where the record from its incompleteness will not enable the appellate court to examine the case on its merits, and no assignment of errors has been filed within ten days after bringing up the record, as required by art. 897 of the Code of Practice, the appeal must be dismissed.

APPEAL from the City Court of New Orleans, *Collins, J.*

Wray, for the plaintiff.

Rawle, for the appellant.

MARTIN, J. The dismissal of this appeal is asked on the ground, that the appellant has not brought up the record in such a manner as to enable us to examine the merits of the case. His counsel has attempted to draw our attention to what he calls, errors apparent on the face of the record. The transcript was filed in this court on the 11th of January, last. The case was called for hearing in the first week of March instant. No written assignment of errors had been filed, according to the Code of Practice, art. 807, which requires such an assignment to be filed within ten days after the record is brought up. In such a case, the code makes it our duty to dismiss the appeal. We have often held that the appellee's claim for the dismissal is irresistible. 1 La. 52. 6 La. 144, 156, 209.

Appeal dismissed.

Leonard and others v. Fluker and another.

HENRY LEONARD and others v. ROBERT FLUKER and another.

Minor heirs, who have not accepted, must be considered (saving their right to accept at a future time,) as strangers to the succession.

Under the provision of the Code of 1808, book 3, title 1. art. 74, which declares that "until the acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect the deceased, who was the owner of the estate," prescription ran against a vacant succession, although minors were interested. A change in the law by which prescription was allowed to run, under certain circumstances, against minors, will not deprive one interested in pleading it, of the benefit of the time elapsed before the repeal of the old law. The time so elapsed may be added to that since the majority of the party, to make out the necessary period of prescription.

*** APPEAL from the District Court of St. Helena, Jones, J.**

GARLAND, J. The plaintiffs represent that they are the children and legal heirs of Eliza, the late wife of Samuel Leonard, who died in the month of November, 1818. They allege that a community of *acquêts* and gains existed between their mother and her husband, composed of personal property and lands, situated in the parish of St. Helena, which has never been divided according to law, and were not inventoried until the year 1841. They aver that they were minors at the time of their mother's death, and for many years afterwards.

The petitioners also aver, that in the year 1824, the Sheriff of St. Helena, under an execution which had issued on a judgment in favor of Whiting and Fletcher against Samuel Leonard, their father, seized and sold to Abner Womack, a tract of land on the *Amité River*, commonly called the *Redding tract*, containing 640 acres, which belonged to the community that existed between their deceased mother and Samuel Leonard, their father.

This sale, the petitioners aver, is null and void, because the whole property did not belong to their father, and the necessary formalities were not pursued in selling it. They state that the defendant Fluker pretends to be the owner of this land, comprising their undivided half. That he has cleared and cultivated it, destroyed valuable timber, and committed other trespasses: wherefore they claim \$2400 for rent, and \$2500 for damages.

They pray that Fluker and Leonard may be cited; that they, the petitioners, may be decreed to be the owners of one half of the land; that the Sheriff's sale may be declared a nullity; that a partition may be ordered between them and Fluker and Leonard, or whichever is the owner; and that the former may be condemned to pay the rent and damages claimed.

Fluker filed various exceptions to the petition, which were overruled; and he answered by general denial, and an admission that he was in possession of the land claimed, it forming a part of a larger tract purchased of one Kendrick. He averred that he held in good faith, under a just title, and had made improvements to the value of \$1950, which he claimed in case of eviction. He further averred, that the plaintiffs are not entitled to all their mother's rights. He pleads the prescription of ten years, under a title translativ of property; and prays that the representative of Kendricks' succession may be cited in warranty.

Leonard answered, by admitting the truth of the allegations of the plaintiffs. The administrator of Kendrick's estate was cited; but it does not appear he ever answered, or that any judgment by default was taken against him.

The facts of the case are, that Samuel Leonard was, many years ago, married to the mother of the plaintiffs; that she died about the month of November, in the year 1818, leaving five children, one of whom died about three months after the mother, and another about the year 1832. The three plaintiffs, at the time of their mother's death, were minors. The oldest being nine or ten years of age; the next, about seven or eight years, and the youngest about five or six years old. No inventory was made of the succession, until early in the year 1841; nor was any step ever taken by the father of the plaintiffs, during their minority, or by them afterwards, (until the period mentioned,) to accept or renounce the succession; nor was any motion made by any one to compel them to accept or renounce, although they were in the parish. An act of sale from George Reddin to John W., and Samuel Leonard, dated in August, 1818, was offered in evidence, but rejected by the judge, principally, because it was not exhibited when the defendant prayed over of the plaintiffs' title. In the year 1821, the title to the land was confirmed by Congress, in the

name of Samuel Leonard alone. In 1824 it was seized and sold by the Sheriff, under an execution against Samuel Leonard alone, purchased by Womack, who sold to Kendrick, and, at the probate sale of his estate, purchased by the defendant Fluker.

In May, 1813, George Reddin presented an application to the Land Officers in that district, asking for a confirmation of his title, by virtue of a settlement in 1809; but it seems not to have been acted on. When Leonard afterwards presented the claim for the action of the officers, he states that the original settler was named Vardeman, and that his settlement was in 1803 or 1804, and makes no mention of Reddin's settlement, nor of that of his predecessor Galloway. The heirship of the plaintiffs is clearly shown, and it is admitted that the land in possession of the defendant, is the same that was sold at the sale of Kendrick's succession. Notwithstanding a considerable portion of the evidence offered by the plaintiffs was rejected, the jury found a verdict in favor of John W. Leonard and Maria Leonard, each for one tenth, and the fourth of another tenth of the land in controversy; and against Henry Leonard, as his right of action was prescribed. A judgment was rendered according to the verdict, and a notary appointed to make partition; from which judgment the defendant Fluker, has appealed.

The opinion we have formed on the plea of prescription filed by the defendant Fluker, renders it unnecessary to express an opinion upon the numerous points which the case presents.

The evidence shows, that Mrs. Leonard died in or about the month of November, in the year 1818. In February, 1841, when this suit was filed, Henry Leonard was about thirty-two years of age, John was aged thirty years, and Maria twenty-six years. Until January 23d, 1841, none of the plaintiffs ever accepted or renounced the succession of their mother, although in the parish and residing in the neighborhood of the property claimed. The succession, now claimed by the plaintiffs, was opened while the old Civil Code was in force. That Code, p. 172, art. 118, tells us that an estate is vacant when no person claims it, either as an heir, or under any other title. This court, in the case of *Poultney's heirs v. Cecil's executors*, 8 La. 321, said, minor heirs, without acceptance, must be considered as strangers to the

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succession, which is, in itself, vacant. This being the law in force at the time, it seems to us, that the case comes within the meaning of that provision of the Civil Code of 1808, p. 162, art. 74, which says, that "until the acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect, the deceased, who was the owner of the estate." Under this provision, it was held, in the case of *Davis' heirs v. Elkins and others*, 9 La. 135, that prescription would run against a vacant succession, although minors were interested. We see no reason to change the decision then made, and it is applicable to this case.

It has been urged that, as the provision of the Code of 1808, p. 162, art. 74, has been omitted in the present Civil Code, that law is not in force now. It is not necessary to decide whether prescription will run against minor heirs, who neither accept nor renounce a succession, since the adoption of the new Code; for even admitting in this case, that it does not, it will not benefit the plaintiffs. Previous to the time when the present Civil Code went into effect, on the 25th of June, 1825, six years and a half had elapsed, and five years more elapsed, after the youngest of the plaintiffs had arrived at the age of majority, before this suit was brought. It may be that the law has been changed by the new Code, when the heir is present or known; yet it does not, in our opinion, deprive the defendant of the benefit of the time elapsed, before the supposed change of the law. Laying out of view the time which elapsed between the period when the new Code went into operation, and the time when Maria Leonard arrived at the age of majority, more than eleven years and a half had elapsed, during which the prescription was running. The two periods may, in our opinion be united, and must bar this action.

The judgment of the District Court is therefore annulled; and ours is in favor of the defendants, with costs in both courts.

Lawson, for the plaintiffs.

Bullard and Sheafe, for the appellants.

Smelser, Syndic, v. Williams and others.

MICHAEL SMELSER, SYNDIC, v. REBECCA WILLIAMS and others.

A new trial may be prayed for after three judicial days have elapsed since the judgment was pronounced, provided it has not been signed. C. P. 546. 548.

Decision in *Chandler et al. v. Barker*, 13 La. 316, overruled.

The interrogatories to be propounded to a witness, under a commission, were served on defendants' counsel, who declined to add any cross-interrogatories, but reserved the right of having legal notice of the time of taking the answers of the witness. Notice was not given to defendants' counsel; but the commissioner certified that he gave *timely notice* to the defendants, without showing how it was given, or upon whom it was served. *Held*, that defendants having an attorney on record, who had reserved the right of notice, such notice should have been given to him, that he might be present at the taking of the testimony, and that the deposition was inadmissible. C. P. 434.

Parol evidence is inadmissible to prove a sale of real estate.

Evidence not produced on the trial below, cannot be brought before the Supreme Court on appeal.

APPEAL for the District Court of St. Helena, Jones J.

SIMON, J. This is a petitory action. The plaintiff represents that he is the syndic of his own insolvent estate; that among the property surrendered by him to his creditors, was a tract of land lying on the river Amité, in the parish of St. Helena, containing 640 acres; that subsequently to the said surrender, Williams, the original defendant, illegally obtained possession of the said tract and held possession of the same, and has received the rents and profits thereof up to this time, to the amount of \$3000.

Williams first pleaded the general issue, and denied the plaintiff's alleged right to the land sued for, and particularly his, (Williams,) being in possession of the land described in the petition. He further averred, that the plaintiff has no right to the tract of land possessed by him, the respondent, and situated in the parish of St. Helena, on the river Amité; that he is the owner and possessor thereof by a good and sufficient title purchased from one John Carroll, and that Carroll purchased the same at sheriff's sale as shown by the sheriff's deed. He avers further that should his first pleas not avail him, he is entitled to judgment for the sum of \$5000, which is the value of the improvements by him put upon the land. He also pleads the prescriptions of one and ten years,

which are based upon his good faith and upon his having a title translativo of property; and concludes by praying that the plaintiff's demand may be rejected, or that if plaintiff recovers the land, he be decreed to pay for the value of the improvements.

The death of the defendant having been suggested, the suit was revived against his widow and heirs, who, having been made parties thereto, adopted as their answer, the answer filed by the original defendant, and prayed for a trial by jury.

The jury having returned a verdict in favor of the plaintiff for the land as described in his petition, judgment was rendered thereon accordingly; from which the defendants have appealed.

Previous to the signing of the judgment, but on the sixth judicial day after the verdict of the jury had been rendered, the defendants moved for a new trial, which motion was overruled by the court, on the ground that it came too late.

The motion was made on the sixth judicial day after the verdict was rendered and after judgment had been immediately pronounced thereon, but the judgment was not then signed, and was only signed two days after the motion for a new trial. We differ in opinion with the judge *a quo* and think he ought to have considered the motion. It has been held by this court that a new trial may be prayed for, after three judicial days have elapsed from the pronouncing of the judgment, provided said judgment be not signed. 5 Mart. N. S. 319. This appears to be in conflict with the decision of this court in 13 La. 316; but it seems to us that the rule settled by our former jurisprudence, is a correct interpretation of arts. 546, 548 of the Code of Practice, and we are unable to see any good reason why a judgment, which is not signed, should not be open to revision. In this case, however, the record contains all the evidence on which the case was tried; the application for a new trial is based on the ground that the verdict is contrary to law and evidence; and we may fairly proceed to examine its soundness and sufficiency to support the pretensions of the appellants.

The next point arises out of a bill of exceptions taken to the opinion of the court, admitting in evidence a certain certificate of the Land Office issued in favor of the plaintiff, and also the deposition of the witness Breed, taken by virtue of a commission.

It seems to us that the certificate objected to was properly received. It is in favor of the plaintiff for the quantity of acres of land mentioned in his petition, situated in the parish of St. Helena. It was produced in support of the allegation of title contained in the petition, and goes to establish the right set up by the plaintiff under his allegations.

With regard to the testimony of the witness Breed, we think the objections made by the defendants must be sustained. This testimony was taken by virtue of a commission, in answer to interrogatories propounded to the witness by the plaintiff. Those interrogatories were served upon the defendants' counsel, who declined propounding cross-interrogatories, but reserved the right of having legal notice of the time of taking the answers of the witness. Now, the commissioner certifies that he gave *timely notice* to the defendants; but he does not show how such notice was given, nor upon whom it was served. The defendants had an attorney on record; the reservation was made by this attorney; and it seems to us that they had a right to require that notice should be given to their attorney, in order that he might be present at the taking of the testimony. This is also positively required by law, the Code of Practice (art. 434) which declares that "the party, on whose application depositions have been taken, must, *before he can use them* as evidence in the cause, show that the adverse party has been served with a written notice of the time and place, &c. &c."

The other objection made to Breed's testimony, on the ground that his answers prove sales of real estate by parol, appears also to be well founded. The inferior court should have rejected all those parts of the testimony going to show the sales and purchases made by and to various persons, of the tract of land in controversy, and particularly the sale made by one Dean to the plaintiff, under which he obtained his certificate from the Land Office. In a petitory action, it is not only required that the plaintiff should make out his title, but that it should be made out by legal and proper evidence.

The plaintiff's parol evidence in support of his title being thus rejected, it becomes unnecessary to examine the other bill of exceptions relative to the refusal of the court to charge the jury as

Ogden v. Michel and Husband.

required by the defendants' counsel, as the case is to be remanded for a new trial. We must remark, however, that the record comes up in a very confused state; that it contains written evidence belonging to the defendants, which was not produced on the trial, or which is not referred to as such in the judge's statement of the facts adduced by the parties. We presume that this circumstance is, perhaps, in this instance, the result of an oversight of the clerk; but we cannot forbear expressing our views upon it, and our determination not to permit parties to bring up evidence before us on appeal, which was not produced below on the trial of the cause. It is clear that in justice to the inferior judges, and in the constitutional exercise of our appellate jurisdiction, cases should be brought before us in the same state as they were tried below.

It is therefore ordered and decreed, that the judgment of the District Court be annulled, and reversed, and that this case, be remanded to the lower court for a new trial; the appellee paying the costs of this appeal.

Sheafe & Davidson, for the plaintiff.

Lawson & Bullard, for the appellants.

ROBERT NASH OGDEN v. JOSEPHINE MICHEL and Husband.

An exclusion of warranty, fraudulently made, cannot avail the vendor, who is bound to disclose redhibitory vices and defects, within his knowledge, not discoverable on inspection. C. C. 2480. *Aliter*, where such exclusion was made in good faith, there being no proof that the vendor knew of the existence of such vices.

The redhibitory action must be instituted within a year from the date of the sale; the only exceptions to this rule being, where the vendor knew of the vice and neglected to declare it to the purchaser; or, not being domiciliated in the state, absented himself before the expiration of the year following the sale, when the prescription remains suspended during his absence. C. C. 2512.

APPEAL from a judgment of nonsuit in the District Court of East Baton Rouge, *Johnson, J.*
Elam, for the appellant.

Edwards, for the defendants.

BULLARD, J. The plaintiff sues to rescind the sale of a slave, made to him by the defendant as the testamentary heir of Luppé, on the allegation that the slave was represented as a good subject and free from all redhibitory vices and defects, whereas; he was addicted to theft and running away, to the knowledge of the defendant. There was judgment against him and he has appealed.

It is shown that the sale of the slave and other property was made by an auctioneer. The advertisement which preceded the sale, setting forth its conditions and terms, states that the whole will be sold with the right, title and interest, that the said Luppé had thereto, and that no other guarantee will be given. The sale at auction was followed by a conveyance before a notary, and the act of sale, which bears date January 9th, 1837, purports to convey all the right, title, and interest, which Luppé deceased had in and to the slave, *with no other warranty*.

From January, 1837, until the spring of 1841, the boy William appears to have conducted himself well. More than four years after the sale to the plaintiff, he ran away. It appears that for four or five years before the death of his former master, he had not run away, although previously he had done so repeatedly. He seems to have been a faithful servant for many years, until he finally made his escape from his new master. The allegation that the vendor (Michel) knew of the former habit of the slave, is fully negatived by the evidence. The exclusion of any other warranty than that of the title derived from Luppé was, therefore, made in good faith; and there is nothing to show any fraud on the part of the vendor.

The case of *Turner & Renshaw v. Wheaton et al.*, 18 La. 37, relied on by the appellant, is to the same effect. In that case, the exclusion of warranty, as to every thing except title, was made with a knowledge on the part of the vendor of redhibitory vices, which he failed to disclose at the time of the sale, and which good faith required him to disclose. The principle laid down in article 2480 of the Civil Code that "although it be agreed that the seller is not subject to warranty, he is, however accountable for what results from his personal act, and any contrary stipulation is void" receives its application in such cases as that above quoted. An

exclusion of warranty, made fraudulently, cannot avail the vendor, because he is bound to disclose those vices and defects, within his knowledge, which are not discoverable on inspection. In this case ten or twelve years had elapsed without any act on the part of the slave, showing a disposition to run away. Whether the habit might then be said to exist, or to have ceased at the time of the sale and to have revived afterwards, is a question we do not think it necessary to decide. Even if that were doubtful, we think it clear that the action is barred by prescription. The redhibitory action must be instituted within a year at the furthest, commencing from the date of the sale. The only exceptions laid down by the Civil Code are, when the vendor had knowledge of the vice, and neglected to declare it to the purchaser; and where the vendor, not domiciliated in the state, has absented himself before the expiration of the year. Art. 2512.

We have already said that the vendor is not shown to have known of the existence of the vice, if indeed it can be said to have existed at all, at the moment of the sale, after it had ceased for so many years to manifest itself by any overt act.

Judgment affirmed.

WILLIAM GARRETT JOHNSON v. BRISBANE MARSHALL and another.

Where the protest and certificate of notice have been made in the manner required by the act of 13 March, 1827, copies thereof, certified by the notary to be true copies from the originals in his office, will be evidence of all the matters therein contained.

It is not necessary that the certificate should state that such copies were made from a record made in the presence of two witnesses.

The certificate of notice of the protest of a bill or note, signed by the notary alone, without the attestation of two witnesses, is insufficient. Such notice must be shown by testimony under oath, or by an official certificate in strict compliance with legal forms.

The general rules of evidence established by the Civil Code, book III, tit. IV, ch. 6, arts. 2229 to 2270, are applicable to all contracts whatever.

The act of 27 March, 1823, so far as it renders the maker of a note, bill of exchange, or other negotiable paper incompetent, under any circumstances, as a wit-

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ness in an action against an endorser, was repealed by art. 3521 of the Civil Code. In an action by the payee, against the endorers of a note who put their names on it merely to secure its payment, the latter must be viewed as sureties, and as such will be entitled to avail themselves of all the pleas, not personal to the principal, of which he could take advantage : C. C. 2208.

One partner cannot sue another for any sum paid for the partnership, or any funds placed in it, until a final settlement, and then only for the balance which may be due.

APPEAL from the District Court of West Feliciana, *Weems, J.* presiding.

Lobdell, for the plaintiff.

Bowman and Downs, for the appellants.

SIMON, J. The defendants, sued as endorsers of a promissory note drawn by one Thomas Short and Francis Routh *in solido*, are appellants from a judgment condemning them to pay the amount thereof.

The defence set up is : that the note sued on is a security obligation, contracted with the plaintiff, by the defendants and other persons, as sureties for Thomas Short, for the purpose of enabling Short and the plaintiff to carry on their tavern at the bay of Pascagoula, as partners in that concern ; that the plaintiff, having been charged to liquidate the concern, cannot maintain this action, not having settled the partnership accounts with Short ; and that, on a final settlement of the partnership, Short will not be found indebted to the partnership, or to his co-partner, in any sum. They further plead division, and aver that the other parties to the note are equally bound, and able to pay their proportions of the obligation ; and conclude, by denying all the allegations contained in the petition.

Our attention has been first called to a bill of exceptions, taken to the opinion of the lower court overruling the defendants' objections to the receiving in evidence a duly certified copy of the protest and certificate of notice to the endorsers ; and it has been contended, that as the said copy did not purport to be a copy from a record made in the presence of two witnesses, it could not be admitted as legal evidence of notice. The notary certifies that they "*are true copies from the originals in my office ;*" and the certificate of service of the notices appears to have been attested

by two witnesses. By the act of 1827, concerning protests and notices to drawers and endorsers, it is provided, that whenever the notaries shall have made their protest and certificate of notice in the manner therein prescribed, *a certified copy of such protest and certificate, shall be evidence, of all matters therein stated.* Bullard & Curry's Digest, p. 43. The copies objected to in this case, appear to have been made in compliance with the act of 1827; and indeed, this question cannot be distinguished from the case of *Whittemore v. Leake and Howell*, 14 La. 394, in which the same objection was raised against the production of a similar copy. The case of *The Gas Light Bank v. Nuttall*, 19 La. 448, to which we have been referred, did not present the same question. There, the plaintiff produced a single certificate of the notary, without the attestation of witnesses, and we held that it was insufficient, and that "notice must be shown, either by testimony under oath, or by an official certificate in strict compliance with legal form."

The next bill of exceptions relates to the rejection of the testimony of Thomas Short, one of the makers of the note, whose evidence was introduced to establish the partnership alluded to in the defendants' answer, and the other facts necessary to prove the consideration of the note sued on in connection with the alleged partnership. This testimony was rejected by the court *a qua*, on the ground that Short, being a party to the note, was interested in the result, and that, notwithstanding the release, the testimony was taken at a time when he was interested. This question has been finally settled by the decision of this court in the case of *Waters v. Petrovie and Blanchard*, 19 La. 584, in which it was held, that the general rules of evidence established by the Civil Code, must be considered as applicable to all contracts whatever; and in which we declare in substance, that the act of the 27th of March, 1823, so far as it renders the maker of a note, &c., an incompetent witness in an action against the endorser, is repealed by the last and repealing article of the Civil Code. This doctrine must be maintained: and, in accordance with it, we cannot hesitate to say, that the inferior judge erred in rejecting the testimony of Thomas Short, although he is one of the makers of the note sued

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on. The objection may perhaps affect his credibility ; but it cannot, under our present laws, render him incompetent.

We must, therefore, consider the testimony of Short, which is found in the record, as being legally before us, and as making a part of the evidence adduced by the defendants in support of their defence.

On the merits, it has been shown that the note sued on was really given in consideration of the partnership contracted between Johnson and Short, and that its amount was to be used, in case it should have been discounted, as part of the partnership funds advanced by Thomas Short; that the plaintiff agreed, that if it could not be discounted, he would keep it on his own account; that Short might pay it off out of his share of the profits of their joint establishment ; and that the note might serve as ultimate security for the plaintiff in the event of accident or loss. The note sued on was given in lieu of one for \$4000 which was given up by the plaintiff, who required the new note *to be secured by the same names* ; and it cannot be doubted that the defendants, and the other parties to the note, signed it for the only purpose of securing its amount. If so, they must be viewed in the light of sureties, and as such, they are entitled to avail themselves of all the pleas, not personal, to which the principal is entitled. Civil Code, arts. 2208, 3029. 12 Mart.-278. 10 La. 415.

The evidence also shows that the partnership in question was contracted in October, 1835 ; that it was to commence in December following ; that it was dissolved in December, 1836 ; and that it was agreed that, at the expiration of each year, a settlement of the partnership concerns should be effected, and a division of the profits declared. It appears further that no settlement of the partnership accounts or transactions has ever been made between the partners, and that the plaintiff took possession of the entire partnership property, and was to pay off the partnership debts, and render an account of his proceedings to his former partner, Thomas Short.

Under such facts and circumstances, it seems to us that we cannot, without injustice to the defendants, compel them to pay now the amount of the note sued on, which, or a part of which might, perhaps prove to be extinguished or compensated after a

fair settlement of the partnership concerns between the plaintiff and the maker of the note. As a partnership transaction, the note now in the hands of one of the partners, is subject to be included, and accounted for in the final settlement of the concerns. It is a debt due either to the partnership or to Thomas Short's co-partner, and it is clear that if this action had been instituted by the plaintiff against the maker, the latter would have been enabled, under the repeated decisions of this court, to resist any attempt to recover the amount sued for, on the ground that a partner has no action against another for any sum paid for the partnership, or any funds placed in it, until a final settlement takes place, and then only for the balance which appears due him. This rule has repeatedly and uniformly been recognized by this court. 10 Mart. 433. 3 Ib. N. S. 477. 6 Ib. N. S. 82. 2 La. 451. 13 La. 415. 1 Robinson, 383.

Under this view of the case, we conclude that this action was premature; and that the defendants, who, as sureties, are entitled to avail themselves of all the pleas, exceptions and other means of defence, not personal, which their principal could have opposed to the plaintiffs' demand, could not be proceeded against for the whole or part of the amount of the note sued on, but after a final and general settlement of accounts between the partners, and as a consequence of the liquidation of the partnership concerns.

It is therefore ordered and decreed, that the judgment of the District Court be annulled, and reversed, and that ours be for the defendants, as in case of nonsuit, with costs in both courts.

HIRAM GILBERT and others v. JAMES COOPER and another.

Where one not a party to a bill or note, puts his name upon it, he will be presumed to have done so as surety.

Where a receipt signed on the execution of a note, recites that it is made in renewal of another in the possession of the payees, which is to be returned by them, or, in default thereof, that the note last executed is to be null, payment of the latter cannot be required until the obligors are put in possession of the first note. It is a condition precedent, upon which the right of recovery depends.

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Where a party's right to recover depends on an act to be done by him, he must show an actual tender and refusal, or that every thing has been done by him, which could be done, to give effect to the contract.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

SIMON, J. The defendants are sued as sureties on a note drawn by Woodruff and Hughes, to the order of the plaintiffs. They resist the claim on the following grounds : that Woodruff and Hughes, being indebted to the plaintiffs in the sum of \$1820, made their note, by which they promised to pay the plaintiffs the sum of \$1878 39, thirteen months after the date thereof: that although the note sued on purports to be dated at New York, May 1st, 1837, it was in fact made and executed at Baton Rouge, and was there received by Bayley one of the plaintiffs, who, on the same day, gave to Woodruff and Hughes a receipt therefor, acknowledging that the same was given *in lieu of another note* of Woodruff and Hughes for the sum of \$1820, due on the 15th of December following, which note they promised to return; in default of which, they agreed that the note now sued on should be held to be null and void: and that the said note of \$1820 never was returned to the makers thereof. The defendants, further allege that the note was made payable to the order of the plaintiffs, but that at the time it was endorsed by the defendants, it was endorsed by said plaintiffs in blank, and that the filling up of the blank endorsement with the words "*without recourse to us,*" was fraudulently done, subsequent to the endorsement of the note by the defendants, and to the prejudice of their rights. They plead that the subsequent filling up of the plaintiffs' endorsement, ought to have the effect of estopping them from demanding payment from the defendants, as they were thereby deprived of the recourse they would have had against their previous endorsers, if the note had continued in the same form it was in at the time it passed from the hands of the defendants.

The receipt alluded to in the defendants' answer is thereto annexed, and is in the following words: "Baton Rouge, 1st May, 1837. Received from Woodruff and Hughes, their note for \$1878 39, at thirteen months after date, in lieu of their note for

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\$1820, due the 15th of December, 1837, with additional interest till due, which we promise to return ; in default of which, the first above mentioned note to be null and void. Signed, Gilbert, Bayley and Draper."

'The note sued on is dated "New York, 1st May, 1837;" is made payable to the order of the plaintiffs, and is endorsed first by the plaintiffs, "pay to the order of Cooper and Mussenden, without recourse to us," which endorsement is followed by that of the defendants.

The Inferior Court, after hearing the parol evidence adduced by the plaintiffs to establish the nature of the defendants' obligation, and to explain the circumstances under which the note was endorsed by the plaintiffs, gave judgment in their favor against Cooper ; from which the latter has appealed.

The evidence shows clearly that the note sued on was originally endorsed by Cooper and Mussenden, previous to being endorsed by the plaintiffs ; and that it was made payable to the order of the plaintiffs, was executed at Baton Rouge on the same day that the receipt shown by the defendants was signed, and was endorsed by Cooper and Mussenden, who, according to the jurisprudence of this court, as established in several cases (4 Mart. 539. 3 Ib. N. S. 659. 10 La. 374,) must be presumed to have bound themselves as Woodruff and Hughes' sureties. It is now well settled that, when a person not a party to a bill or note, puts his name upon it, he is presumed to have done so as surety. The testimony of the plaintiffs' former book-keeper, establishes beyond all doubt, that when the note sued on was returned to the plaintiffs' portfolio, it was not endorsed by Gilbert, Bayley and Draper in blank, or otherwise, but that it was then endorsed by Cooper and Mussenden. The latter was the only endorsement upon it. The witness proceeds to explain the circumstances under which the plaintiffs' endorsement was put on the note ; shows that it was subsequent to the blank endorsement of the defendants ; and knows of no other reason for the making of said endorsement, except for the purpose of collecting the note. This testimony appears to be corroborated by the evidence of several other witnesses, among whom, P. A. Walker says, that the note sued on, having been presented to him by Draper, in April or May, 1838,

at the time witness was Cooper's authorized agent, was not then endorsed by the plaintiffs, but had only the names of Cooper and Mussenden; and we must conclude that it was the intention of the defendants when they endorsed the note, to bind themselves as *sureties* for the payment thereof.

The only difficulty which this case presents, arises from the receipt produced by the defendants. According to its terms, the note sued on is to be null and void, that is to say: no right of action shall exist upon it, until the other note be returned. This the plaintiffs promised to do; it is a condition precedent upon which the right of recovery depends; and although no time is specified in the receipt within which it is to be performed, it is clear that payment of the note cannot be required, until the obligors are put in possession of the first note. It is a *potestative* condition, which, as Pothier says, is in the power of the obligees: "*qui est au pouvoir de celui envers qui l'obligation est contractée*," (Obligat. n. 201. Civil Code, 2019;) and which has the effect of suspending the execution of the obligation, until its performance. The obligees have a right of which the obligors cannot deprive them; but its exercise is only suspended, or may be defeated, according to the nature and terms of the condition. Civil Code, art. 2023. We are, therefore, constrained to come to the conclusion, that the defendants, who, as sureties of Woodruff and Hughes, are entitled to avail themselves of all the pleas, not personal, to which their principals are entitled, (see case of *Johnson v. Marshall and another*, just decided,) could not be sued on the note declared upon, until the condition contained in the receipt was fulfilled, or some other act done equivalent thereto. It is a well settled rule that when the plaintiff's right of recovery depends on and arises from an act to be done by him, he must either show an actual tender and refusal, or that every thing has been done by him, which could be done, to give effect to the contract.

Now, it is true that, in this case, a motion was made by the plaintiffs for time to produce the first note, and that it was shown that the principal obligors had made a surrender of their property to their creditors, some time before the note sued on became due; but this was, in our opinion, insufficient to show a compliance with the condition, or to account for its non-performance, or the

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non-production of the first note ; and could not dispense the plaintiffs from returning the note to the principal debtors or to their syndic, and is not a valid excuse for not even producing the note on the trial of this cause. We must consider this action as having been prematurely instituted, and our judgment must be one of nonsuit in favor of the defendants and appellants.

It is therefore ordered and decreed, that the judgment of the District Court be annulled, and reversed ; and that ours be for the defendants, as in case of nonsuit, with costs in both courts.

Avery, for the plaintiffs.

Elam, for the appellants.

SARAH ANN PENNY v. SARAH WESTON and others.

Where a married man removes to this state from one in which the common law, except so far as modified by statute, prevails, by which the personal property of the wife vests in the husband by the marriage, and where slaves are moveables by law, any slaves or other personal effects brought by him will be presumed to have belonged to him. It will be for the wife, or third persons, to destroy the presumption, by proof of title in themselves.

The Court of Probates having jurisdiction of actions for the partition of successions, must necessarily inquire what property composes the estate to be partitioned, and have power to decide upon questions of title incidental to the main question of partition, though without jurisdiction, under other circumstances, to decide such a question.

Cases in which the judge has recused himself, transferred in pursuance of the act of 27 February, 1841, ch. 32, from the Court of Probates, to be tried before the special judge provided by that act, sitting in the District Court, are to be tried in the same manner as if they had not been removed. The law, having made no provision for a trial by jury in the Court of Probates, none can be allowed in any such case by the special judge.

Where by the death of a minor child, its mother becomes seized of all the rights of the former to the succession of the father, no preliminary steps are required to be taken by the mother, in the nature of an *additio hæreditatis* to complete her right ; in order to commence an action against the other heirs for a partition of the succession.

An action of debt against an heir may be premature, before he has signified his intention to accept the succession, and in an action of partition, under such circumstances, the defendant might disclaim ; but the plaintiff is not bound, in the first instance, to institute any proceeding to compel him to assume the quality of heir.

Where in an action for the partition of a succession, in which a settlement of all claims among the heirs ought properly to be gone into, an act signed by the tutrix of the minor heirs, waiving her mortgage as tutrix on a tract of land, had been given in evidence, a promissory note executed as evidence of the debt secured by the mortgage, may be received to rebut the presumption of payment resulting from the release of the mortgage.

This case brought from the Court of Probates of East Feliciana, was tried before *Butler, J.*, sitting under the act of 27 February, 1841, ch. 32, in the District Court of that parish, for the trial of certain cases in which the Judges of the District and Parish Courts had recused themselves or been recused; and the defendants are appellants from his judgment.

Lobdell and Boyle, for the plaintiff.

A. N. Dunn, and *Lyons*, for the appellants.

BULLARD, J. Malachi Weston senr. died in the Parish of East Feliciana leaving two sons, Malachi Weston jun. and Robert Weston and a widow in community. Robert married Sarah Ann Kirkland, and died leaving one child and his widow. The child afterwards died, and his mother became his sole heir. She institutes this action, claiming, in the right of her deceased child, a partition of the grandfather's estate, which she alleges has been in possession of the grandmother, and of Malachi Weston jun. ever since his death, and that its revenues and profits have been enjoyed by them exclusively. It is alleged that the grandfather had certain property consisting principally of slaves, which he brought with him from South Carolina, and which at his death vested, in equal moieties, in Malachi jun. and Robert, and that Robert's moiety is vested in the plaintiff, the mother and heir of his only child. It is also alleged that other property was acquired in Louisiana, of which the widow in community is entitled to one half; Malachi jun. to one fourth, and the plaintiff, in the same right to the other fourth.

Thus far every thing appears simple and free from difficulty. But the matter is rendered complex and involved by the fact that Mrs. Weston had been twice married, previously to her marriage with Weston. First she married Croft, in the state of South Carolina, who died leaving two sons, the descendants of one of whom are parties in this case. Moses Croft, the other son, died in 1828: after the death of Croft, his widow married Edrington, and had one son, who came with her to Louisiana, and died here without

posterity. It is alleged that certain slaves came from a stock owned during the former marriages, and that they are not to be partaken as a part of the succession of Malachi Weston sen., but are the property of the widow herself and of the heirs of her children by the former marriages.

The first question is therefore, one of title, that is to say, which of the slaves belonged to Malachi Weston sen. at his death, and which to the widow, or her descendants by former marriages.

It is shown that the common law prevails in South Carolina, except so far as modified by statute, and that the personal property of the wife vests in the husband by the marriage, and that slaves are moveables by the law of that state. When a married man removes from that state to this, and brings, with his family, slaves and other personal effects, it may be fairly presumed, they belong to him, until the contrary is shown. It is for his wife, or third persons, to destroy the presumption, by exhibiting evidence of title in themselves. The burden of proof is upon them.

The evidence shows that after the death of Croft, the first husband, his children got a part of the slaves, and the widow a part. Whatever became her's vested in her second husband Edrington. It is probable there was a partition, inasmuch, as the representatives of Croft never appear to have claimed those which Weston brought to this state, and which are inventoried as a part of his estate. The same reasoning applies to the son of Edrington, who died without setting up any pretensions to those slaves, which may have been acquired by his father on his marriage. Neither set of children appears to us to have established any title to the slaves claimed by them, and the judge did not err in his decision upon the question of title.

But it is contended that the Court of Probates was without jurisdiction, to determine the question of title between the parties to this controversy. We are of opinion, however, that the action brought by the plaintiff for a partition of the estate, in which her deceased child had an interest, was clearly within the jurisdiction of the Court of Probates. The question of title was incidental only. In every action of partition the first question is, what property composes the estate to be partitioned, and the court is without jurisdiction to decide upon such a question, except as inci-

dental to the main question of partition. That court might, therefore, well inquire, whether particular slaves, which had been inventoried as a part of the succession to be divided, were in fact the property of the succession.

The court did not err in refusing a trial by jury. Although the cause was tried by the Special Judge sitting in the District Court for the trial of such cases as could be tried neither by the Parish nor the District Judge, yet it was a case pending in the Court of Probates, and was to be tried precisely as if it had not been transferred for that purpose alone to the District Court, under the provisions of the statute. The law has made no provision for the trial by jury in Courts of Probates.

It is further contended, that the plaintiff has shown no right to institute the present action, because she could not represent the place, degree and right of her son Robert P. Weston, and that even if she could, she was bound first to institute an action to compel the minor heirs to decide whether they would accept or renounce the succession.

We are of opinion that, on the death of the child, the plaintiff, his mother, became seised of all his rights in and to the succession of the father which he in the same manner, became seised of on the death of his father. Whatever action the father of the minor child might have maintained in relation to his father's estate descended to and became vested in his mother. Nor is it required in cases like the present, that any preliminary steps should be taken, in the nature of an *additio hæreditatis*, in order to complete the right of the plaintiff. The defendants were not bound to assume the quality of heirs, and those who are minors necessarily accept only with the benefit of inventory. The action of debt against an heir might, perhaps, be premature, until such heir had signified his intention to accept the estate; and in an action of partition the defendant might disclaim, but the plaintiff is not bound, in the first instance, to institute any proceeding to compel him to assume the quality of heir.

The defendants and appellants rely upon a bill of exceptions, from which it appears that, after an act signed by the plaintiff as tutrix, waiving her mortgage on a certain tract of land, had been given in evidence, the court permitted a promissory note, which appears to

have been given as evidence of the debt secured by the mortgage, to be read in evidence to rebut the presumption of payment, which might result from the release of the mortgage. It appears that a tract of land, held in common, among the widow and heirs of Malachi Weston senior, had been adjudicated to the widow, Sarah Weston. One fourth was coming to the minor then represented by the plaintiff as tutrix, and the mortgage released was that resulting in favor of the minor from the sale. The note was given by the widow for one fourth of the price of the adjudication. In our opinion the court did not err. If any thing was due to the minor for property disposed of, it was competent for him to show it in an action of partition, in which a settlement of all claims among the heirs ought properly to be gone into. The note given for the minor's share of the price of the land, which had been disposed of by the widow, was, therefore, properly admitted in evidence, to show that the price had not been paid, notwithstanding the release of the mortgage, which appears to have been granted to enable the widow to raise money by a mortgage of the land.

The appellees answer that there is no error to the prejudice of the appellant, but that if the court should think otherwise, and that the judgment ought to be opened, they say that the judge erred to their prejudice, in not allowing the full amount of the value of the use of the property, over and above the off-sets shown by the appellant, the judge compensating said balance against the care and trouble in raising the young negroes, the increase of the old stock. An attentive consideration of this part of the case, and of the principles which appear to have guided the court below, has led us to the conclusion that no error was committed to the prejudice of the appellees. The defendants are made to account for the use of the property which was in their possession. They were then credited with the amount of community debts paid, and with the use of other property which those, whom the plaintiff represent, enjoyed for some time, and a further allowance is, for the trouble and expense of rearing the young slaves of the common stock. This appears to us equitable. Not only had the taxes to be paid on the young slaves; but it is well known that they are in reality an expense to the owner for food, clothing, and medical attention. It is just that the co-proprietor who has reared them, at

his own expense, should be compensated, and nothing shows that the allowance was unreasonable.

The judge who tried the cause appears to have investigated the rights of the parties thoroughly, and to have arrived at just conclusions; and no such error has been brought to our notice, as makes it our duty to reverse the judgment.

Judgment affirmed.

DOLLY SIDES and others v. JOHN NETTLES.

A bequest by testament duly proved and ordered to be executed, is a title translativæ of property, as much as a donation *inter vivos*. C. C. 3451.

The legatee of a particular object will not be presumed to be cognizant of any defect of title in the testator, but be regarded as a possessor in good faith.

APPEAL from the District Court of East Feliciana, *Johnson, J.*

BULLARD J. The plaintiffs, who are the widow and heirs of James Sides deceased, sue to recover of the defendant a negro woman named Diana, who, they allege, was the property of said James Sides. The defendant, after pleading certain dilatory exceptions not now necessary to be dwelt upon, asserted title to the slave, which he derived from Hiram Powell, who he prays may be cited as warrantor. He afterwards pleaded prescription, under a title derived from Charity Powell, the wife of Hiram Powell; and he alleges, that the said Charity obtained the slave by bequest from Job Keys in his last will and testament, which was duly probated; and he further alleges that Job Keys was in possession as owner, long before his death.

Judgment was rendered in favor of the plaintiffs, and the defendant has appealed.

It is shown that Sides acquired the slave in question by purchase from one Ashford, by public act, in August, 1819, and that he continued to possess her until 1824 or 1825, at which time he left the parish of East Baton Rouge, and Job Keys acted as his agent. Job Keys bequeathed her by his last will to Charity

Powell, from whom she was purchased by the defendant, October 24, 1832; and the citation in this case was served on the 6th of May, 1833. The testament of Keys was probated in June, 1827; and on the 9th of July the slave was inventoried as the property of Keys' estate. More than five years had elapsed from the probate of the will, to the inception of the present suit. If, therefore, the testament and probate form a sufficient title upon which to prescribe, and the defendant can add his possession to that of the legatee, the plea of prescription ought to prevail, at least so far as it concerns the widow in community, that is, for one undivided half.

A bequest by testament duly proved and ordered to be executed, is without doubt a title translatif of property, as much as a donation *inter vivos*. The legatee of a particular object is not presumed to be cognizant of the defect of title in the testator, and may be regarded as a possessor in good faith. Civil Code, art. 3451. The legatee sold to the present defendant; and there is no evidence to show that either he, or his vendor, knew that Keys was without title. Although the defendant, therefore, has failed to show any conveyance from Sides to the testator, yet the possession of the legatee added to his own, completes more than five years, during which time the possession of Charity Keys, and the defendant, has been continuous and uninterrupted. It follows that one of the plaintiffs, to wit, the widow, has lost her right to recover, by prescription, while the heirs, who were minors, appear to us entitled to recover one undivided half of the slave and her increase, and of the hire since the institution of this action.

It is therefore ordered and decreed, that the judgment of the District Court be reversed; and it is further adjudged and decreed that as far as it relates to Dolly Keys, the plea of prescription be sustained, and that there be judgment against her, with costs in both courts; but that the other plaintiffs, Susan Shelton and Susan Sides recover of the defendant one undivided half of the slave, Diana and her increase, together with her hire at the rate of five dollars per month since the commencement of this suit, and the

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costs in the District Court, those of the appeal to be paid by the appellees.

Elam, for the plaintiffs.

J. P. Bullard, for the appellant.

MARGARET KENT v. ANTHONY MONGET, Administrator.

Where, in an action by a married woman, the petition alleges that she is authorized by her husband to sue, she will not be bound to prove the fact, unless specially denied; a general denial is not sufficient. Where her authority, to sue is specially denied, she must establish it by evidence, before she can compel the defendant to answer to the merits. C. P. 327, 333, 344.

Though it is well settled that dilatory and declinatory pleas must precede the *contestatio litis*, yet if the petition disclose a total want of legal right or authority to sue in the plaintiff, it may be acted on by the court below at any stage of the proceedings, though not pleaded; as where a married woman sues in her own name, without alleging that she is authorized by her husband. Such a defect could not be cured by any waiver on the part of the defendant.

APPEAL from the Court of Probates of East Baton Rouge, *Tessier, J.*

SIMON, J. The plaintiff is appellant from a judgment of non-suit, rendered against her on the ground that she has not shown, by evidence, that she was legally authorized by her husband to institute and prosecute this suit.

The petition is in the name of "*Margaret Irwin, wife of Frederick M. Kent, both of the parish of East Baton Rouge, said wife herein duly authorized and assisted to institute and prosecute this suit by her said husband.*" It alleges that the succession of H. Longuepée, represented by the defendant as administrator thereof, is indebted to her in the sum of \$850, on a promissory note drawn by one Forbes and endorsed by the deceased; which note was duly protested for non-payment at maturity, and due notice thereof given to the endorser. Wherefore, she prays for judgment against the said succession.

The defendant first pleaded the general issue, and admitted

that the note sued on had been signed by the deceased. He further averred that the note had been endorsed by the deceased, as surety for Forbes, for the payment of a sum of \$500, which was the only consideration received by the drawer from the husband of the plaintiff, who (said husband) had advanced the sum to Forbes as a loan of money, the latter agreeing to pay the sum of \$350, as interest for three months for the said loan of \$500, to which sum the interest was added, making the amount of the note sued on. The defendant pleaded usury, and prayed that this suit might be dismissed with costs.

On the trial of this cause, the plaintiff having closed her evidence, after producing the note and protest and a certified copy of notice of protest given to the endorsers, and proving the signature of the drawer, the defendant attempted to prove the fact of usury alleged in his answer by producing two witnesses, who declared that they knew nothing. Whereupon the judge *a quo*, instead of giving judgment in favor of the plaintiff for the amount sued for, conceived that she had failed to establish the fact of her being authorized by her husband, and rendered the judgment of nonsuit now complained of.

We think the inferior court erred. It is true that the fact of the plaintiff's having been authorized by her husband to institute this action, was a matter of evidence which should have been adduced, if the defendant had denied it specially. It was also a matter of dilatory exception, which the defendant might have availed himself of, by pleading it specially *a limine litis*, before issue joined; and the plaintiff would have been bound to establish her authority to sue, before compelling the defendant to answer to the merits of the action. Code of Practice, arts. 327, 333, 344. But the defendant has not thought proper to require the proof of the authorization alleged in the petition, by denying the fact specially; and, as an exception, it must be considered as waived by the answer to the merits. This court has often held that the plaintiff's want of authority to sue, must be taken advantage of by a special denial, as a general denial is not sufficient to put it at issue. 2 Mart. N. S. 389. 5 Ib. N. S. 343. 1 La. 283. 4 La. 323. 7 La. 595, 599. We are, therefore, of opinion, that the plaintiff's allegation that this suit was instituted with the au-

thorization of her husband, ought to have been taken below as admitted by the defendant; and that the judgment appealed from, based solely upon an assumed exception not pleaded, is clearly erroneous. 10 La. 169.

It seems to us proper to remark, however, that although it is a well settled rule that dilatory and declinatory pleas ought to precede the *contestatio litis*, yet if the petition had disclosed a total want of legal right or authority to sue in the plaintiff, this would have been a proper matter to be taken into consideration and acted on by the court *a qua*, at any stage of the cause. 4 Mart. N. S. 437. 17 La. 234. But here the petition shows that the plaintiff was duly authorized by her husband to institute this action; the fact of authorization is alleged; and, being considered as admitted by the pleadings, the plaintiff was not bound to produce evidence to establish it. It would have been different if the plaintiff, being a married woman, had sued in her own name, without alleging that she was authorized by her husband, as then the petition would have disclosed, on its face, an absolute want of authority or legal right in the plaintiff to institute the action, which no waiver of the defendant could cure.

On the merits, the case appears to have been satisfactorily made out; and the defendant has not shown that the plaintiff is not entitled to recover.

It is therefore ordered and decreed, that the judgment of the probate court be annulled and reversed; and that the plaintiff do recover of the succession of H. Longuepée, represented by the defendant as administrator thereof, the sum of \$850, with five per cent interest per annum thereon, from the 15th of May, 1841, until paid, and \$4 50 costs of protest; the costs in both courts to be borne by the succession.

Brunot, for the appellant.

Elam, for the defendant.

SARAH PICKARD and Husband v. WILLIAM STEWART.

APPEAL from the District Court of East Feliciana, *Johnson, J.*

MARTIN, J. This suit is brought for the recovery of one half of the price of a tract of land, the property of the wife, sold during her minority by the defendant, her step-father. The claim is grounded on a deed of sale of a tract of land, given to the wife as is alleged therein, in payment of one half of the price received by the defendant on the sale of her land. The defendant pleaded the general issue; and further, that the deed mentioned in the petition was signed by him in error and obtained in fraud; and that at the time he received the price of the land alleged to have been sold by him, there existed a community of goods between him and his then wife, the mother of the plaintiff, Sarah Pickard, who is one of her heirs. There was a verdict and judgment for the defendant, and the plaintiffs have appealed. It does not appear to us that any part of the evidence supports the verdict. In the notarial sale mentioned in the petition, the defendant admits that he sold Sarah Pickard's land, and that the consideration of the sale which he makes to her is one-half of the price he received for it, and that the other half is still unpaid. The sale of the land is farther proved by the answer of the plaintiff Sarah Pickard to interrogatories propounded to her by the defendant. There is some evidence that the defendant is a weak old man, perfectly illiterate, and liable to be imposed upon; but nothing induces the presumption of an attempt to impose upon him. There is, however, room to believe that he has good ground to retain the portion of Sarah Pickard in the estate of her late mother, his wife, as the money was received during the community which existed between him and her.

There has been a settlement of the community which existed between the defendant and his wife, Sarah Pickard's mother, whose estate has been partitioned between the plaintiff and a minor co-heir of hers. We are, therefore, of opinion that, as to one fourth of the price of the land sold by the defendant there has been confusion; that is to say, that Sarah Pickard is a debtor

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as heir to her mother, for that fourth ; and that therefore, the half of the price now claimed is reduced to one fourth, for which the defendant may be ultimately liable ; but as she has consented to a division of her claim by receiving the half due by the defendant, settled the community estate, and partitioned it with her co-heir, who, by receiving his part of their mother's estate, has become liable to pay her his share of the community debt for which the estate of the mother is bound, we believe it just that she should first attempt, before pursuing the defendant, to seek relief from her co-heir, whom she has permitted to receive a part of the fund which is principally chargeable with her claim.

It is therefore ordered and decreed, that the judgment be annulled and reversed, and that ours be for the defendant ; reserving however to Sarah Pickard, her claim against him for the fourth part of the price of the land, in case of her failure to recover it from her co-heirs, in using due diligence therefor ; the defendant paying the costs of the appeal.

Lawson, for the appellants.

J. P. Bullard, for the defendant.

MARGARET E. NIMMO and others v. CALEB D. BONNEY and another, Executors.

A bequest by which the testator directs that certain slaves shall be given to his legatees, to serve them until such slaves attain a certain age, when they are to be emancipated, is not a *fidei commissum*. The emancipation is a donation to the slaves of their value, to be received at a future and fixed period ; and the usufruct, or hire of them in the mean time, is a legacy to those in whose favor it is made.

Where slaves are directed by a testator to be immediately emancipated by his executors, the heirs of the deceased will be entitled to retain them in their possession, and to enjoy their services, until they can be legally emancipated.

Action by the heirs against the executors to recover the possession of certain slaves until they can be legally emancipated, in compliance with the will of the testator and the value of their services from the death of the ancestor : *Held*, that, the petitioners having proved their heirship only on the trial of the cause, the executors, who were rightfully in possession of the slaves and bound to keep them, are not accountable for the value of their services.

Nimmo and others v. Bonney and another, Executors.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

MORPHY J. The petitioners have taken this appeal from a judgment of nonsuit rendered against them below. As the heirs at law of their uncle George Langley, late of the parish of East Baton Rouge, they claim the delivery of a certain number of slaves, which the deceased, by his last will and testament, left in the possession of the defendants as his executors and legatees. In his will, executed in the olographic form in 1835, the deceased bequeathed to each of the defendants a portion of his slaves, to serve them, and their heirs, until they should severally arrive at the age of thirty years, at which time, he desired, that the said slaves should each of them be emancipated. After this bequest the will contains the following clause, to wit: "It is my desire that the following named slaves be emancipated immediately at my decease, namely: *Comfort*, aged 33 years; *Nancy*, 33 years; *Katy*, 21 years; *Henry*, 18 years; *Elena*, 12 years; and *James*, 2 years; and, after all my debts are paid as before named, that all my personal property be equally divided between the five following named slaves, which I wish emancipated immediately after my death, namely: *Nancy*, *Katy*, *Henry*, *Elena* and *James*, and that they be under the special care and protection of both my executors, *Caleb D. Bonney* and *Thompson W. Bird*; and finally that both my executors see the above testamentary dispositions strictly complied with." The record does not show the precise date of the death of George Langley. It seems however to have taken place in 1836, but his will was probated and letters testamentary ordered to be delivered to the defendants only on the 16th of May 1838, since which time it does not appear that they took any steps to carry into effect the will of the deceased, in favor of those slaves whose immediate emancipation was ordered; but they have always kept them in their possession. Evidence taken under a commission shows, that George Langley never married, and left no forced heirs in the ascending line. It further establishes that the petitioners are the legitimate daughters of James and William Langley, two brothers of the deceased.

Under these facts, it has been contended on the part of the plaintiffs and appellants:

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• *First.* That the clause of the will bequeathing certain slaves to the defendants, to serve them until the age of thirty years and then to be emancipated, contains a *fidei commissum*, and is therefore void even with regard to the defendants.

Second. That the other negroes, whose immediate emancipation is ordered by the will, continue to be slaves until such emancipation is made according to law, and that as such, they must be surrendered to the legal heirs of the deceased.

I. We cannot view the bequest to the defendants as a *fidei commissum*, or substitution, within the meaning of article 1507 of the civil code. It has none of its features. The defendants are not charged to preserve for, or return any property to a third person, who must remain without any acquired right to it, until their death. During a limited time and until an emancipation of the slaves can lawfully take place, the defendants are allowed to enjoy their services and labor, as the heirs at law of the deceased would have enjoyed them, in case the will had simply ordered them to be emancipated at the age of thirty years. The slaves themselves are not, in the mean time, without some acquired rights under the will. As *statu liberi* they become capable of receiving by testament or donation, and of standing in judgment to claim the protection of the laws to prevent their removal out of the state. Civil Code, arts. 193, 194, 196. This clause of the will comes we think more properly within the purview of article 1509. The emancipation of the slaves is a real donation to them of their value, to be received under the will at a future and fixed period, while the usufruct, or hire, of such slaves in the mean time, forms a legacy to the defendants. Dispositions of this kind are believed not to be of unfrequent occurrence in this country, where slaves cannot, except in certain cases, be emancipated under the age of thirty years. 1 Robinson, 115.

II. No attempt has been made to explain why the executors have thus far neglected to carry into effect the will of the testator, in relation to the slaves who were to be emancipated immediately after his death. As the plaintiffs have averred in their petition that these slaves were not born in the state, and this allegation has not been denied in the answer, or disproved on the trial, it may account for their inaction, at least as to such of them as are

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under thirty years. The law of the 31st of January 1831, which authorizes the Police Jury of each parish to permit the emancipation of slaves under that age, upon a proper showing being made to them, applies only to slaves born in the state. B. & C's. Dig. p. 429. But be this as it may, it is clear that these negroes did not become absolutely free by the homologation of the will of Langley; that they can become so, only by a compliance with the formality required by law for the emancipation of slaves; and that until this be done, they continue to be slaves, and owe their services and labor to the estate of the deceased. Civil Code, 184. 4 Mart. N. S. 102. 7 Ib. N. S. 351. 18 La. 15. The question to be decided is, not whether these negroes are entitled or not to their emancipation under the will, but whether, as long as they remained slaves, the petitioners have not a better right than the defendants to detain them in their possession, and enjoy their services and labor.

It is not easy to perceive what right the defendants can set up in opposition to that of the heirs at law of the deceased. Even if under the will, they ever had the seisin of the estate, which from the wording of that instrument does not clearly appear, it expired long before the institution of this action. How then can they refuse to surrender to the petitioners property in their hands belonging to the estate of their uncle, and undisposed of by his will? This surrender will not impair the right of the slaves to obtain their emancipation whenever it can legally take place; nor can it prevent the executors from executing their trust, in the same manner as if they never had the seisin of the succession, and it had passed immediately into the hands of the heirs at law on the death of the testator. This they can the more easily do, as under the law approved March 13th, 1837, they are to continue in office until the estate shall be wound up, and their trust fully discharged. Civil Code, arts. 1652, 1665. B. & C's. Dig. p. 3.

As to the hire of the slaves, the defendants are not, in our opinion, accountable for any. They were rightfully in possession of them, and were bound to keep them. They could not surrender them to the petitioners who, before the institution of the present action had not caused themselves to be recognized as the

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legal heirs of the deceased. It is only on the trial of this cause that they proved their heirship. Civil Code, art. 1181.

It is therefore ordered that the judgment of the District Court be reversed, and that the plaintiffs do recover the possession of the slaves *Comfort, Nancy, Katy, Henry, Elena* and *James*, and enjoy their services until they be lawfully emancipated according to the will of their late master; the costs of both courts to be borne by the appellees.

T. G. Morgan, for the appellants.

Elam, for the defendants.

AMOS ADAMS v. ARCHIBALD M. STUART.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

MARTIN, J.* This is a possessory action for a slave. The claim was resisted on allegation that the plaintiff had no other possession of the slave, than as tutor of the defendant. There was judgment as in case of nonsuit, and the plaintiff, after an unsuccessful attempt to obtain a new trial, has appealed. His counsel has drawn our attention to a bill of exceptions taken to the refusal of the judge, to permit him to ask of a witness of the defendant, in what manner he lost the possession of the negro, as tutor. It appears to us the court erred. He might have shown that he lost the possession of the slave by surrendering it to his ward on his coming of age, and that afterwards he obtained it from him by purchase, or other lawful means, or that the slave had been sold to discharge a debt of the minor's ancestor, or of the minor himself, &c.

It is, therefore, ordered and decreed, that the judgment be annulled, and reversed, and the case remanded for further proceedings according to law, with directions to the judge to permit the plaintiff to prove in what manner he lost the possession of the

* *Bullard, J.*, being interested in the question, did not sit on the argument of this case.

Edwards v. Walker, Sheriff, and another.

slave, as tutor ;—the defendant and appellee paying the costs of the appeal.

C. P. Cook, for the appellant.

Elam, for the defendant.

MATHEW EDWARDS v. JOHN C. WALKER, Sheriff, and another.

Under a *fiery facias* against the principal and surety on a twelve months bond, executed for the price of property sold under execution, the sheriff may seize and sell the property of the principal, or of the surety, or of both, to the amount of the debt and costs. C. P. 719, 720.

APPEAL from the District Court of East Feliciana, *Johnson, J.*

Lawson, for the appellant.

Lyons, for the defendants.

MORPHY J. The petitioner enjoined an execution, under which his property was about to be sold as the security of John C. White on two twelve months bonds taken in a suit of one Louisa Taylor against the latter, amounting together to \$1866.13. He represents that on the 15th of October, 1840 the said Louisa Taylor took out an execution against him and his principal, and made on it a sum of \$700, by the sale of some of White's property ; that on the 2d of February, 1841, she caused another execution to be issued for the balance of the debt, which was levied, on the third of March following, on 414 acres of land belonging to White, and that on the 12th of the same month other property of the same debtor was seized, consisting of one ox wagon, three yoke of oxen, and one sorrel mare, all of which property was advertised to be sold, when, on the 25th of March, the plaintiff in the execution, by her attorney, ordered the sheriff to return the writ into court, which the latter did ; and that another execution was then sued out under which his (plaintiff's) land and slaves were seized and advertised to be sold. The petition avers that this last writ was irregularly and illegally issued, and that all proceedings under it are null and void ; that by the previous levy, a lien and privilege was created on the property of White in favor of the seizing creditor, which should enure to his benefit as surety, and

that he has the right to enjoin the sale of his property until that of White his principal, has been sold, and the proceeds credited on the execution. The petition concludes with a prayer that the injunction may be made perpetual, and that Louisa Taylor, may be cited as a party to this suit. The answer denies that there is any irregularity or informality in the proceedings had in the case, which could have entitled the plaintiff to an injunction, and prays that the same may be dissolved with damages, costs, &c; but should the court be of opinion that there was good cause for an injunction, then the answer further shows that since the issuing of the injunction, the property mentioned as having been seized, has been again seized under another writ, and on being sold produced a very trifling sum, bearing no proportion to the amount of the writ, and that it was in consequence of the insufficiency of the levy, that the writ had been returned and the seizure released. The inferior court ordered the injunction to be maintained so far as regards the costs, without prejudice to the rights of the plaintiff in the execution. The plaintiff in the injunction has appealed.

The record shows that, on the first exposure for sale of the tract of land seized as belonging to White, it was bought in by himself, for one dollar over and above the amount of the mortgages on it, which greatly exceeded its value. This adjudication was in itself a nullity, as he could not purchase what already belonged to him. On the second attempt to sell under the writ, which issued after the plaintiff took out his injunction, no bid whatever was offered for the land, which it appears cannot be sold on account of the mortgages on it. As to the sorel mare, ox wagon, and three yoke of oxen, which had been seized by reason of the evident insufficiency of the property first levied upon, they were not produced by White at the time of the sale; his interest in them only was sold which brought five dollars. The only cause of complaint alleged by the plaintiff in his petition for an injunction having been thus removed, and his costs having been allowed below, what could he expect to obtain by invoking our interference? We cannot, as his counsel has urged us to do, give any instructions to the sheriff as to the course he is to pursue. He must look to the law which, in a case like the present, directs him to seize the property of the principal, or of the surety or of both, to the amount of the debt and costs.

Code of Practice art. 719, 720. Under those articles the sheriff might have begun by seizing the plaintiff's property; or, having made an insufficient levy on White's effects, he might, under the same writ, have seized the land and negroes of the appellant, to an amount sufficient to satisfy the debt, and have sold the whole together, even, if in this case, it was an irregularity to return the first writ without selling the property seized under it, and to sue out another. The judge below was right in not rendering perpetual the injunction, when it is clear that the party enjoined had the right to proceed to a new levy by taking out an *alias* or a *pluries fi. fa.*

Judgment affirmed.

LOYALL W. LOW v. JOSEPH R. THOMAS.

Compensation takes place by the mere operation of law, the two debts being extinguished as soon as they exist simultaneously. C. C. 2204.

APPEAL from the District Court of West Feliciana, *Johnson, J. Dalton*, for the plaintiff.

J. P. Bullard, for the appellant.

MORPHY, J. This suit is brought on a note drawn by the defendant to the order of the petitioner, and on an open account, amounting together to \$337,23. After pleading the general issue, the defendant set up, in compensation and reconvention, several claims amounting to \$483 16. The inferior court rendered a judgment in favor of the plaintiff for \$204 11, the amount of the note sued on, with interest at the rate of ten per cent per annum from the 1st of January, 1836, subject to a credit of \$24 on the 12th of April, 1836. The defendant has appealed.

On an examination of the evidence, the judgment appealed from appears to us substantially correct. The appellee has, however, requested that it should be amended, by rejecting two items of the defendant's account against which he has pleaded prescription. One is for the boarding of plaintiff's clerk at defendant's house;

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the other is for the rent of a store leased to the plaintiff. In relation to the rent, the three years required for prescription had not elapsed when the claim was set up in this suit; but even were it otherwise, the plea could not be sustained. The evidence shows that these two claims of the defendant existed simultaneously with those of the plaintiff against him; they were therefore reciprocally extinguished to their respective amounts, by mere operation of law before the inception of this action. Civil Code, art. 2204.

Judgment affirmed.

ELIZA ADAMS v. JANE McCAULEY and Husband.

It is not necessary in an action on a lost title, that the petition shall state such loss. Where the affidavit of the plaintiff of the loss of the instrument sued on, has been read without objection, parol evidence may be admitted to prove its contents.

APPEAL from the District Court of West Feliciana, *Johnson, J.*
MARTIN, J. The plaintiff claims a female slave and her increase, in the possession of the defendants, who pleaded the general issue, and amongst other matters, that the pretended bill of sale from John Brown to the plaintiff, a copy of which is annexed to the petition, is a disguised donation, not in an authentic form, and unaccompanied with possession. On the trial, the affidavit of the plaintiff, establishing the loss of the original bill of sale was read without opposition; and her counsel having asked a witness whether he had not seen the original bill of sale, and whether it was not signed by John Brown, the question was objected to, on the ground that the loss of the instrument had not been accounted for by sufficient evidence; and the plaintiff having offered to read the copy annexed to the petition, this was also objected to, as not being authenticated and proven as the law requires. Both objections were sustained, and a bill of exceptions taken. There was judgment against the plaintiff as in case of nonsuit, and she has appealed.

Bergeron v. His Creditors.

The counsel for the appellees has contended that the court did not err in preventing the question from being answered, as the plaintiff had not apprized the defendants, by the pleadings, of the loss of the instrument, which was declared on as *in esse*, as the advertisements of its loss were made too late, and no due diligence was exercised to recover it.

We are not acquainted with any law requiring in a suit, on a lost title, that the petition shall state the loss. The plaintiff may indulge the hope of recovering it. The advertisements were proved; no exception appears to have been taken below, to their having been published too late, and none is stated in the bill of exceptions. Whether the defendants might have objected to the reading of the plaintiff's affidavit of the loss of the instrument, is a question which the case does not present for our solution. It is not denied that it forms inchoate proof; it is only asserted that this proof is *insufficient*. In the case of *Miller v. Webb*, 8 La. 517, in which the defendant appealed, on the ground that judgment had been rendered against him on a bill of exchange, the loss of which had been established by the affidavit of the plaintiff only, which had been read without opposition, we affirmed the judgment. It appears to us that the court erred.

It is therefore ordered and decreed, that the judgment be annulled, and reversed, and that the case be remanded for further proceedings, with directions to the judge to permit the question put to the witness to be answered; the defendants and appellees paying the costs of the appeal.

Dalton and A. M. Dunn, for the appellant.

Lyons, for the defendants.

MICHEL BERGERON v. HIS CREDITORS.

APPEAL from the District Court of St. James, *Deblieux, J.*
Remy and Cannon, for the appellants.

M. Taylor and Winchester, for the syndic.

SIMON, J. This is an appeal from a judgment rejecting the op
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position of the widow and heir of Jules Balloc deceased, to the tableau of distribution filed by the syndic of the creditors of the insolvent, in which the said widow and heir were put down as *ordinary creditors*, for the sum of \$38,275.

The opposition sets forth that the insolvent is indebted to the opponents in the amount carried in the tableau, but that instead of being placed therein as ordinary creditors, they should have been ranked as mortgage creditors to be paid in preference to the insolvent's wife, out of the proceeds of the sale of the slaves, on the ground that Balloc's mortgage has never been released. It is further stated that the wife's renunciation is binding upon her, because the retraction made by her is null and void, as it was not notified in due time to the opponents; and that the judgment rendered in favor of Peyroux & Co. having been obtained, by collusion with the insolvent, and in fraud of the rights of the other creditors, their account must be set aside, and its amount distributed among the mortgage creditors. The opponents pray that they may be placed among the mortgage creditors for the sum of \$38,275, by preference to the insolvent's wife; that her retraction may be declared null and void; and the claim of Peyroux & Co. be set aside as fraudulent.

The only serious question which this case presents, arises out of the pretended conventional mortgage given by the insolvent to Jules Balloc to secure certain endorsements which the latter had given for the insolvent's benefit; and it is contended that the notes produced by the opponents, and on which their mortgage claim is founded, are the same alluded to in the act of mortgage, or were given and endorsed in renewal of the original notes.

The evidence shows that on the fifth of March, 1833, a certain act of conventional mortgage was executed by the insolvent in favor of Jules Balloc, in which it is declared: "*Que M. Jules Balloc, négociant, &c., a endossé pour lui (M. Bergeron) des billets montant ensemble à la somme de vingt-cinq mille piastres; et que pour garantir audit sieur Balloc les effets des susdits endossements, il a, par ces présentes, affecté, obligé, et hypothéqué en sa faveur les propriétés ci-après, &c.*" It is further stipulated in the said act: "*Lesquelles propriétés devront rester hypothéquées jusqu'à l'extinction desdits endossements, à quelque somme qu'ils se ré-*

duisent, au moyen des renouvellemens et des diminutions que M. Bergeron pourra faire à ses susdits billets." Now, the opponents have produced seven notes which have never been protested, though apparently endorsed by Jules Balloc, two of which, of \$6300 each, are dated 1st of March, 1833, and the five others are all dated subsequent to the mortgage, to wit: two dated, 26th March, 1833, one 9th December, 1833, another 27th March, 1834, and the last 2d April, 1834. It is not shown that the amount of the notes was ever paid by Jules Balloc, or by his widow and heir. They are all endorsed by other persons before Jules Balloc, who is the last endorser; and it seems strange that those notes, not being paid at maturity, should not have been protested, for the purpose, at least, of securing the recourse of the bearer against the previous endorsers. One of the notes is also certified "*Ne varietur*" by a notary public and is undoubtedly secured by some other mortgage. Be this as it may, it appears to us clear that five of the notes produced, were not those contemplated by the act of mortgage, their dates are posterior to the act, and they are not shown to have been given in renewal of other notes. The act of mortgage says, "*que Jules Balloc a endossé pour lui des billets.*" The notes must have been then in existence; they had already been endorsed; and if those produced were given to renew them, it was the duty of the opponents to prove this fact, in order to identify them with the act of mortgage.

With regard to the two notes dated previous to the act of mortgage: A document produced by the syndic, which appears to be a receipt showing the manner they are to be disposed of and accounted for, was executed by Jules Balloc on the 19th of April, 1833, in which he declares that he received said two notes from the drawer Michel Bergeron, "*formant ensemble la somme de \$12,600, dont je m'oblige de lui tenir compte, payé que je sois de ces deux billets.*" Now, it cannot be doubted that these two notes had not been and were not endorsed by Balloc at the time of the mortgage, though dated previously. They were endorsed by other persons, and were not delivered to Balloc until about six weeks after the giving of the mortgage. They were transferred to Balloc for some particular purpose, which is not shown. Balloc was to account to the drawer for their amount, after payment

at maturity ; and the endorsements of Balloc on the notes only show, that having been put in his hands, or transferred to him on the 19th of April, 1833, he subsequently endorsed them over to other persons. It is not shown that he paid them ; and if they had been taken up at maturity by Michel Bergeron, the receipt shows that Balloc was to account to him for the amount paid by the drawer. This transaction appears to be of a different nature from that contemplated by the parties in the act of mortgage ; and we are not ready to say that the said notes were among those alluded to in the act.

We must, therefore, conclude that the opponents have failed to identify the notes by them produced, with the pretended conventional mortgage given to secure Balloc's endorsements, and that the inferior judge has not erred in rejecting their pretensions.

The solution of this first question renders it unnecessary to examine the validity of the wife's retraction of her renunciation, as the opponents have shown no mortgage to be preferred to her's ; and as their opposition contains no allegation against the judgment obtained by the wife against her husband the insolvent, for the amount of which she was placed on the tableau. It is obvious that her claims being undisputed, are not subject to any farther investigation.

With respect to the claim of Peyroux, Rivarde & Co. it is contested by the opponents, on the ground of fraud and collusion. They say that the judgment obtained by Peyroux, Rivarde & Co. against Bergeron was collusive ; but they state no fact to show in what the fraud consisted. This general allegation of fraud and collusion could not be sufficient to require a new investigation of the rights recognized by the judgment, unless the opponents had been able to point out the errors contained in it, as the result of the collusion and fraud of the parties thereto, to the prejudice of the other creditors of the insolvent. The record contains no evidence whatever, from which collusion and fraud could be inferred. The transactions complained of appear, on the contrary, to have been carried on fairly, and honestly ; and after a thorough examination of the liquidation made by the lower court, we have been unable to discover any error in it that requires our interference.

Judgment affirmed.

THE COMMERCIAL BANK OF NEW ORLEANS v. ALBERT STEIN.

Where in an action to recover possession of plans, books, &c., there is a verdict for the restoration of certain plans and books, and in default thereof, condemning the defendant to pay a fixed sum, a new trial must be allowed that the verdict may determine what sum shall be paid on failure to deliver each particular plan or book.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. The petition states that the defendant, who was heretofore employed by the plaintiffs as an engineer, and superintendent of the works erected by them, for supplying the city of New Orleans with water, retains a number of plans, maps, and estimates made by him, or by persons employed under him by the plaintiffs, which are indispensable to them for continuing the said works, and a number of books and papers relating to the said works, as well as a quantity of pipes, implements, and materials, their property, and refuses to deliver them to the plaintiffs, or to his successor in office, the whole of which are of the value of forty thousand dollars. The petition concludes with a prayer that the defendant may be condemned to deliver the same to them, or pay the said sum. The defendant pleaded the general issue. The case was tried by a jury, who rendered a verdict against the defendant, for the delivery of ;

First. A large plan or map of the city, showing the streets in which pipes have been laid, and their calibre.

Second. A book, or books of plans, showing the size of pipes laid in each street, and the exact termination of the pipes from the termination of the square, &c.

Third. An invoice book, in which are recorded all contracts for pipes imported for the bank, &c.

Fourth. An inventory of the pipes remaining on hand, at the defendant's resignation.

Fifth. An account of all pipes laid, their sizes, and where laid, up to the same period. In default of the said delivery, the verdict declared that the plaintiffs should recover from the defendant the sum of eight thousand dollars. The court gave judgment according to the verdict, and the defendant, after an unsuccessful

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attempt to obtain a new trial, has appealed. The court, in our opinion, erred, in refusing the new trial, principally on the ground of the jury having neglected to divide the sum, which the defendant should pay, in case he did not deliver all the five articles aforesaid, into five sums, one or more of which, the defendant should pay in case he failed to deliver one or more of the said five articles. The jury ought to have said that in case the defendant failed to deliver the first article he should pay such a sum, and so on. It appears from the record that some of the books and documents claimed, and the delivery of which the verdict directs, were brought into court and used as evidence by the plaintiffs' counsel. The evidence does not show that the large plan or map of the city, which is the object of the first article, was ever executed. It appears only that it was begun.

Justice requires that the case should be remanded for a new trial, in order that, if the defendant be mulcted in damages, on account of the improper detention of any one of the articles claimed, he may not be mulcted (as by the present verdict he is,) as heavily as for the improper detention of all of them.

It is therefore ordered and decreed, that the judgment be annulled and reversed, the verdict set aside, and the case remanded for further proceedings according to law; the plaintiffs and appellees paying the costs of the appeal.

Canon and Eustis, for the plaintiffs.

Hoffman and Grimes, for the appellant.

JUAN YGNACIO LABORDE v. THE CONSOLIDATED ASSOCIATION
of the Planters of Louisiana.

In an action to recover a sum paid out by the bankers of the plaintiff on a check alleged by the latter to have been forged, the testimony of a witness, taken under commission declaring that he forged the check, will be admissible; the objection resulting from his confession, going to his credit, rather than to his competency. Even a verdict of guilty, not followed by judgment, is not sufficient to establish the infamy of the witness, and render him incompetent.

A banker who pays a forged check, must support the loss.

APPEAL from the Commercial Court of New-Orleans, Watts, J. F. B. Conrad, for the plaintiff.

Labauve, for the appellants.

BULLARD, J. The defendants having rendered an account as the bankers of the plaintiff, in pursuance of an interlocutory judgment of the Commercial Court, a single item of it was contested by the plaintiff. That item was a sum of \$1999,09 charged to have been paid on the plaintiff's check, dated June 13th, 1839. It is alleged by him that the check is not genuine, but a forgery, and that the loss must fall upon the bank. The Commercial Court, being satisfied that the check was forged, gave judgment against the bank, and it has appealed.

The evidence upon which the court came to this conclusion is two fold, resulting, first, from a comparison of the check in question with numerous others admitted to be genuine, and secondly from extraneous circumstances relating principally to the conduct of a clerk of the plaintiff by the name of Viaña, who disappeared soon after the presentation and payment of the check.

All the checks, twenty-two in number, came up with the record, and have been carefully compared by us. The most striking difference between the signature of the one in question, and that of all the others, is in the abbreviation of the middle name of the plaintiff *Ygnacio*, which on the disputed check is written *Ygo*. whereas on all the others it is written *Ygno*. the letter *n* being entirely omitted. There is a difference also in the manner of dating the check. It is "*13th of June*," while in all the others the preposition *of* is not used in designating the month. In all the others, also, in which the word hundred is employed it is written with a small *h*; in the disputed one it is written with a capital *H*. The flourish, a common appendage to a Spanish signature, is much larger than most of the others, and has fewer strokes of the pen. One witness testifies, and inspection confirms it, that Laborde's handwriting is more inclined.

It is shown that Viaña, who had been the clerk of the plaintiff, left New Orleans for New York shortly after the check was paid; and that, on the eve of his departure, on board the steam ship, he stated to an acquaintance, that he had a considerable sum of money about him concealed in his belt, and that he was going to em-

ploy it in the purchase of goods. It is further proved that some time previously Viaña had imitated the signature of Laborde, his employer, and exhibited it to an acquaintance, who was introduced as a witness, who found it a good imitation of a signature which he knew to be an original. Viaña then tore it up in very small fragments, which he threw carefully away behind some barrels in the store. Being asked why he took so much pains to destroy the signature, he answered that Laborde was a very particular man, and would be displeased to see his signature lying about the counting house.

There is in our opinion nothing suspicious in the circumstance, that the plaintiff did not at once investigate the state of his account with the bank, when he was informed that it was overdrawn ; because it appears manifest from the bank book that the overdraft was not occasioned by the payment of the contested check.

When his book was afterwards balanced, and twenty-two checks handed to him in order to verify his account, he, within a few hours returned them to the bank, and pointed out the check which he alleged was spurious. It is true that this was some time after the disappearance of Viaña ; but nothing shows that the plaintiff was previously aware of the existence of such a check.

But the plaintiff gave in evidence the deposition of Viaña himself, taken under a commission, who avows without hesitation that he counterfeited the signature of his employer, and drew the amount out of bank upon the forged check. This deposition was read notwithstanding the objections of the defendants' counsel, that the very avowal of guilt on the part of the witness renders him infamous ; that he has placed himself beyond the reach of a prosecution for perjury by flying from justice ; and that the introduction of such evidence tends to encourage collusion, and subornation of perjury. It is true that the testimony of such a witness adds nothing in our judgment, to the proof of the alleged fact. "*Nemo allegans turpitudinem suam audiendus est.*" In a suspicious case it might even operate against the party calling such a witness. But the objection goes rather to his credit than to his competency ; because his infamy, in a technical sense, results from his conviction of a crime. Even a verdict of guilty, not followed by judgment, would not be sufficient to establish the

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infamy of the witness, and render him incompetent. 2 Starkie on Evid. 714, *et seq.*

We do not discover any thing in the conduct of the plaintiff which should, in equity, throw upon him the loss resulting from the payment to his clerk of a forged check. The clerk does not appear, ever to have been trusted by the plaintiff with drawing checks, and signing the name of his employer. His employment was that usual with clerks in commercial houses; and we are not prepared to say that under circumstances, such as are disclosed in this case, the loss ought to fall on the employer.

Judgment affirmed.

GEORGE HARRISON v. THOMAS C. POOLE, and another.

Where an attachment has been set aside on account of the insufficiency of the bond, the plaintiff may take out another attachment without filing a new petition, or having paid the costs of the first. Art. 492 of the Code of Practice does not apply to such a case.

Where a defendant has appeared by counsel and joined issue on the merits, objections to the steps taken to bring him into court will be disregarded.

A restriction on the power of a partner to use the name of the firm in the usual course of trade, will be without effect, as to third persons without notice. Not even fraud on the part of one partner will be any defence for his co-partners, where the obligation was contracted in the usual course of their trade, and the fraud was not participated in by the creditor.

The execution of a note raises a presumption that a just consideration has been given for it; and the maker who pleads error or failure of consideration, must show it: but where one partner is sought to be made liable on a note given by the other, and he alleges fraud and want of consideration, and shows circumstances somewhat suspicious, the burden of proving the consideration will be on the plaintiff.

APPEAL from the City Court of New Orleans, *Collins, J.*

MORPHY, J. This suit is brought by the payee of a promissory note for \$700, drawn to his order, payable on demand, and dated on the 27th of April, 1841. On the allegation that the drawers, Poole & Co., were a commercial firm in New Orleans, composed of Thomas C. Poole and Thomas E. Allen, and that the latter resided in New York, a writ of attachment was sued

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out, and judgment prayed for, *in solido*, against the two partners. No answer was filed by Thomas C. Poole, against whom no further steps were taken in the suit. Thomas E. Allen appeared by counsel, and for answer averred that, the plaintiff's first writ of attachment having been quashed, he had no right to take out another, without first paying the costs incurred, and presenting another petition demanding the issuing of a second writ. The answer avers, that the defendant is not indebted to the plaintiff in any amount whatever; that the note sued on was not given by him, or by any partner of the firm of Poole & Co., in payment of any debt or demand due and owing by the firm; that it was made fraudulently and without consideration, so far as the firm is concerned, by one Thomas C. Poole, who had no authority to sign the name of the firm to notes or obligations whereby to bind the same to the plaintiff, who received the note sued on, with the full knowledge that Poole was without authority to give it, and at a time when all business connection had ceased between the defendant and his former partner. The answer further avers, that the plaintiff never gave any consideration whatsoever for the note, and calls for strict proof. There was a judgment below in favor of the plaintiff from which this appeal was taken.

The plaintiff's writ of attachment having been set aside, by reason of the insufficiency of the bond given, he forthwith took out another. This, it is contended, he had no right to do, without previously paying the costs of the first writ, and filing a new petition. Article 492 of the Code of Practice, which is relied on in support of this position, does not, in our opinion, extend to a case like the present. The attachment, which held the place of a citation to the absent defendant being found defective, we can see no good reason why the plaintiff should not be permitted to have another writ issued under the same petition; and should be compelled to go through the vain ceremony of drawing up and filing another in the same terms. The defendant, moreover, having appeared by counsel, and joined issue on the merits, the judge below properly disregarded his objections to the steps taken to bring him into court.

From the articles of agreement between the defendants, it appears that Thomas E. Allen furnished the stock in trade of the

partnership, and was to receive one half of the profits of the business, which was to be carried on in New Orleans by Poole, who bound himself not to buy or sell goods on credit, but to confine himself to a cash trade, and not to use the name of the firm on notes, drafts, &c. There is no evidence showing any knowledge in the plaintiff of the restricted powers of Poole, the managing partner of the firm, which was a commercial one, nor does it appear that any public notice was given of such restriction. Third persons, without the means of knowing the precise extent of his authority, might well have supposed that he had that of using the name of the firm. They were not bound to inquire whether such a power had been expressly delegated, as it is one within the scope of the trading partner's general authority. Not even fraud on the part of one partner can afford his co-partner a legitimate defence, if the obligation is contracted in the usual course of their trade, and the fraud is not participated in by the creditor. Gow on Partnership, p. 38, 39, 147. 3 Kent's Comm. p. 41. In the present case, the averment in the answer that the note was given fraudulently, without consideration, and at a time different from that apparent on its face, implies that it was a transaction fraudulent and collusive between the plaintiff and the managing partner of the firm. Although the note bears date the 27th of April, 1841, and purports to be payable on demand, the subscribing witnesses to it testify, that they saw it for the first time, and signed it only a few days before the dissolution of the partnership, published on the 13th of April, 1842, and after they had heard of a difficulty between the partners; and the plaintiff told them that his object in getting their names put on the note, was to enable them to remember that they had seen the same in his hands before the dissolution. The record shows, that independent of the notice alluded to by these witnesses, the dissolution of the partnership was advertised in the Bulletin Newspaper, on the 22d of March, 1842, at which time it really took place, and Poole left the store. There is no positive evidence to show that the note was in existence before the time referred to by the subscribing witnesses. It further appears, that no entry of this note was made in the partnership books, and that although Allen, who was then in New Orleans, had announced himself as charged with the liqui-

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dation of, and ready to pay all legal demands against the firm, the note in question was not presented or mentioned to him by the plaintiff, who went to the store between the 22d of March, and the 13th of April, and who made a settlement with Allen for some articles sold by the firm. Under such circumstances, the plaintiff, we think, should be held to strict proof of the consideration he gave for this note. It is true, as has been urged by the appellees' counsel, that the execution of a note raises a presumption that a just consideration has been given for it, and that the maker who pleads error, or a failure of consideration, is bound to show it; but when, as in the present instance, one partner is sought to be made liable on a note given by the other, and he alleges fraud and an absolute want of consideration, and shows circumstances somewhat suspicious, the *onus* of proving the consideration must rest on the plaintiff, as the defendant cannot prove a negative. In the present case, the record does not satisfactorily establish that any consideration was given. As we have concluded to remand the case in order to allow the plaintiff an opportunity of introducing additional evidence, if he can, we deem it proper to refrain from any comment on that we have before us.

It is therefore ordered and decreed, that the judgment of the City Court be reversed, and this case be remanded for a new trial, the costs of this appeal to be borne by the appellee.

C. K. Johnson and Larue, for the plaintiff

Vason, for the appellant.

SAMUEL CLARK v. ROWENA CHRISTINE and others.

Courts of ordinary jurisdiction have exclusive cognizance of actions to annul a partition of slaves, made among the heirs of a succession.

The remedy given to a defendant, by proceedings on the sequestration bond, is not exclusive of others.

APPEAL from the District Court of East Baton Rouge, *Tessier*, J. presiding.

GARLAND, J. A reference to the case of *Cooney's Heirs v. Clark*, 7 La. 156, and to that of *Clark v. Christine*, &c. 12 La.

394, will exhibit all the material facts of this case, not here stated. The object of this suit is the same as that of the suit commenced in the Probate Court of East Feliciana, above mentioned, and dismissed for want of jurisdiction; that is to say, to annul for fraud and collusion, the partition made in 1828, in the said court between Madame Christine and her co-defendants, whereby the slaves held in community between Madame Christine and the children of her first husband (Cooney) were all divided between the latter, as being their individual property, inherited from their father; in consequence of which, the plaintiff was prevented from satisfying a judgment which one Morris had obtained against Madame Cooney and transferred to him, the particulars of which are stated in the case, in 7 La. 156.

The answer of the defendants presents the same questions as those raised by their answer to the suit in the Probate Court; but in addition to that defence, they set up a demand, in reconvention, against the plaintiff for \$2680, for the hire of certain of the slaves, now in controversy, which they allege that the plaintiff possessed, and had the use of from November 1st, 1834, to November 1st, 1838. An account is annexed, setting forth the demand in detail.

The case was tried by the Parish Judge, the District Judge recusing himself. The plea to the jurisdiction and other exceptions were overruled; and, on the merits, a jury found a verdict for the plaintiff in general terms, declaring the partition null and void, but saying nothing about the demand in reconvention. The defendants moved for a new trial on the ground that their demand in reconvention had not been acted on, and that the verdict was contrary to law and evidence. The motion was overruled, and a judgment given declaring the partition made on the 25th of September, 1828, between the widow and heirs of John Cooney, null and void; the slaves named in it being adjudged to belong to the community, and the undivided half of the property liable for the payment of the debts of Rowena Christine. From this judgment, the defendants have appealed.

The plea to the jurisdiction of the court does not come with a very good grace from the defendants. When they were sued in the Probate Court of East Feliciana, they excepted to its jurisdiction, and were successful in their plea; and now, when sued in

the District Court of the parish where they live, the same exception is interposed. But we consider the question as settled by the decision made when the case was last before this court. 13 La. 394.

On the merits, we are of opinion that the verdict and judgment are not sustained by the evidence. The partition which is alleged to be fraudulent, does not purport to be of all the property in community between Rowena Christine and her deceased husband. It is of the slaves only; and it is stated in it that there is other property not divided. The only debts shown to have been owing by the widow at the time the partition took place, amount to about \$500 with some interest, if the amount brought in marriage by John Cooney be excluded; which, from the testimony, appears to have been about \$1000. It may be, that it was in consideration of this latter sum, that the widow of Cooney abandoned whatever right she may have had in the slaves; as it appears that they are all descendants of the woman, who was purchased with the money owing to him at the time of his marriage. It is not shown that Cooney's widow was insolvent, at the date of the partition. The judgment obtained against her about that time, was satisfied, by the seizure and sale of the negroes Nelson and Lucy, in the following year; and the judgment now set up by the plaintiff was not obtained until the 17th August, 1834, nearly six years after the partition. It is, in fact, the judgment which the plaintiff recovered against Cooney's widow, on her warranty to him, as shown by the report in 7 La. 156, and the allegations in the petition. The judgment in favor of Morris against her, we think was extinguished by the Sheriff's sale in October, 1829; and the debt now claimed, being subsequent to the partition, the plaintiff must make out a case which will authorize him, as a posterior creditor, to attack it. This he has failed to do.

The defendants had a clear right to have their demand in reconvention decided on. Evidence as to the value of the hire of the slaves was offered, but no decision was made in relation to its effects. It may have been, that the judge thought the demand in reconvention not connected with, or incidental to the principal cause of action; but that is not necessary in this case, as the plaintiff resides in a different parish from the defendants. Article

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375 of the Code of Practice has been amended, (B. & C's. Digest, 156, No. 22,) and a demand in reconvention for a cause, not necessarily incidental to the main action, may be examined into. 4 La. 434. The plaintiff insists, that as the demand is for the hire of the slaves, of which it is alleged that he had the services during the pendency of the suit in the probate court, the defendants must resort to their action on the sequestration bond. That the defendants have a remedy on the bond is probably true; but we do not consider it exclusive of all other remedies, if they choose to pursue them. The bond was given for the defendants' security; but if they do not rely on it, they may take whatever other course the law permits.

We think justice will be promoted by remanding this case for a new trial.

The judgment is therefore annulled and reversed, the verdict set aside, and the cause remanded to be tried *de novo*, the judge on the trial thereof conforming his opinions to the principles herein expressed, and otherwise proceeding according to law; the appellee paying the costs of the appeal.

Lawson, for the plaintiff.

Elam, for the appellants.

GEORGE POLLARD and others v. GEORGE COOK and another

A general denial will place the *onus* of proving notice of protest on the plaintiff, who must establish that such notice was sent to the post office, nearest to defendant's residence, whether in the same or another state; and the latter may, under the general issue, show that the office to which it was sent was not the nearest. Post offices in the United States are established by law; and no evidence is required of what the law is.

APPEAL from the District Court of West Feliciana, *Johnson*, J.
Stevens, for the appellants.

Paterson, for the defendants.

MARTIN, J. The plaintiffs are appellants from a judgment in a suit against the defendants, as drawers of a bill of exchange; and

the case turns on the regularity of the notice of the protest to the latter. The petition generally avers, and the answer equally denies the notice. After the case was fixed for trial, and the time had come for taking it up for trial, the defendants obtained leave to file an amended answer, stating, that there was a post office nearer to their place of residence than the one to which the notice was sent. There was a bill of exceptions to the leave, on the ground that the answer came too late, and that it changed the nature of the defence. According to the opinion of this court in the case of *Landry v. Gamet*, (1 Robinson's Rep. p. 364,) the answer came too late. The notice was alleged and denied; the *onus probandi* was, therefore, on the plaintiffs, and they were bound to prove a legal one. The defendants reside near St. Francisville, and the notice was directed to them at the post office there. The distance from their residence to that town is not otherwise stated, than in the averment of their living thirty-five miles from the court house. The petition states, that they reside in the parish of West Feliciana. St. Francisville is the seat of justice of that parish, the post office of that town was, therefore, at a distance of about thirty-five miles from their residence. It is in evidence that there are two post offices nearer to their residence, to wit, that of Pinckneyville in the state of Mississippi, which is sixteen miles from it; and that of Red River Landing, in the parish of Pointe Coupée, which is distant from five to ten miles.

The legal notice of a protest must be sent to the post office nearest to the residence of the party. The plaintiff is, therefore, bound to prove that the office to which he sent the notice, was the nearest. If he fails to do so, he fails to prove a legal notice. When he has made his proof, the defendant may, without having pleaded anything but the general issue, show that the post office to which the notice was sent, was not the nearest; one means of doing which is, certainly, to show that there are others nearer. This has been done in the present case. It is urged, that neither of these two offices, is within the parish in which the defendants reside, and that one of them is in another state. This, in our opinion, is perfectly immaterial. The facility of reaching a given place is not diminished, by the dividing line of two parishes or states crossing the road. It is further urged, that for some time,

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the post office at Red River Landing was without a post master. Wherever a post office is established, it is a proper place to direct letters to, until it is suppressed; for the department takes care that it be not long without an incumbent. Post offices are established by law, and the court requires no evidence of what the law is. It is bound to take notice of it.*

Judgment affirmed.

DEBORAH MCCLUSKEY v. THOMAS WEBB.

The validity of a judgment ordering the execution of a will, cannot be inquired into collaterally.

A bequest of whatever may remain after the payment of debts to a sister of the testator, for the purpose of educating her children, and subsisting her and them, with power to her to make such other disposition of the property to their use and benefit as circumstances may require; and providing that his brother shall participate in such property, to a certain extent, should he consider himself in equal need with his sister's family, is not a substitution or a *fidei commissum*. *Per Cur.* The testator does not leave the property to his sister to preserve it for, and surrender it at any time to her children. She has the entire control of it, to maintain herself and children, to educate them, and to do whatever she may think their interest requires. She may expend it all for such purposes.

A substitution is never presumed. Unless the will cannot be understood otherwise it will be maintained.

To acquire by the prescription of ten years, it is not enough to show a title translativ of property, accompanied by possession for ten or twenty years. Good faith is essential, and must have existed at the commencement of the possession. Code of 1808, p. 488, art 72. Such good faith does not consist in the belief only, that the person whose rights are acquired was the real owner of the property. This is indispensable to constitute good faith on the part of the purchaser; but, even where it exists, there may be bad faith in the latter, as where a deputy sheriff purchases property sold by himself under a *feri facias*. He knows the vices of his title; and does not, according to art. 495 of the Civil Code, possess as owner by virtue of an

* An application for a re-hearing having been made by *Stevens*, on the authority of *The Gas Bank v. Desha*, (19 La. 459.) GARLAND, J., in refusing it said: "The difference between this case, and that cited is, that here the defendants have proved that there were two offices nearer to them than that to which the notice was sent, and have thus discharged themselves, as we said they might do." R.

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act sufficient in terms to transfer the property, of the defects of which he was ignorant.

A purchase by a deputy sheriff of property sold by himself under a *feri facias*, is absolutely null.

Where a title is absolutely null, it cannot be the basis of prescription. *Aliter*, as to relative nullities. If those in whose favor they are established do not complain, prescription may be acquired under a title containing such relative nullities.

The prescription of five years, established by the act of 10 March, 1834, applies only to informalities in the manner of advertising and making public sales.

APPEAL from the District Court of St. Helena, Jones, J.

Lawson, for the plaintiff.

Sheafe and J. P. Bullard, for the appellant.

MORPHY, J. This action is brought by the plaintiff as a legatee under the last will of John W. Leonard, to recover a tract of land in the possession of the defendant, denominated the Gustavus tract, and designated as section No. 15 on the township map of Township No. 2, Range 4, East. The petition alleges, that the testator died without descendants or ascendants, and that after a few bequests to his collateral relations, he willed, that whatever may remain, after the payment of his just debts, should be paid over to the plaintiff, his sister, for the purpose of educating her children Ferdinand, Alfred, and Elenor, and to subsist them and herself, and to make such other judicious disposition of the property to their use and benefit as circumstances may require; that he willed, moreover, in case his property should produce more than sufficient to pay his debts, "that his brother Samuel Leonard should participate in the overplus, in the following ratio, (if he considered himself in equal need with his sister's family,) that is to say, from the first \$1000, he should receive \$200; from the second thousand, \$300; from the third thousand, \$350; from the fourth thousand, \$400; from the fifth thousand and all other sums, an equal moiety, &c;" that the deceased died on the first of November, 1818, and that his last will, in the olographic form, was probated according to law. That on the 11th of December, 1823, Thomas Webb, then acting as deputy sheriff of the parish of St. Helena, under the authority of two writs of *feri facias* is sued against Samuel Leonard, did levy upon the aforesaid tract of land, which belonged to the succession of J. W. Leonard, to satisfy the same; and that, on the 19th of January, 1824, the said

Thomas Webb, at a sheriff's sale, did sell and adjudicate the said property to himself, for the price of fifty-one dollars, payable in a twelve months bond, as appears by the return made by himself as deputy sheriff in the case of *Whiting & Fletcher v. Samuel Leonard*. The petition further avers, that the pretended sale by the defendant to himself was absolutely null and void, as made in contravention of law, and because the land was sold as the property of Samuel Leonard, when in fact it did not belong to him, but to the estate of the late J. W. Leonard. The petition further shows, that the plaintiff's three children Ferdinand, Alfred, and Elenor, legatees with herself under the will, have all three died, and that she, as sole surviving parent, has succeeded to all their rights; and that Samuel Leonard is the only legatee under the will who is, or may be interested in the said tract of land. The petition concludes by praying that he be made a party to this suit; that the sheriff's sale be declared a nullity; and that the land be surrendered to the legatees, to be disposed of according to the provisions of the will. Various exceptions taken to the petition, some of which will be hereafter noticed, having been overruled, the defendant pleaded the general issue, and set up the prescription of five and ten years. The case was laid before a jury, whose verdict being in favor of the plaintiff, judgment was entered up accordingly; whereupon the defendant appealed.

There is no dispute about the facts of this case, which the record shows to be as stated in the petition.

On the trial, the introduction of the last will of the deceased was objected to, on the ground that it had not been legally probated, it appearing from the *procès verbal* drawn up by the judge that the probate was made at the dwelling house of the late J. W. Leonard, when it should have taken place at the Court House. The judge properly disregarded this objection. A Special Court was held by the Probate Judge of St. Helena at the residence of the deceased. Being satisfied by the evidence adduced, that the material requirements of the law for the validity of olographic testaments had been complied with, he rendered a judgment confirming the will, and ordering its execution. This judgment cannot be inquired into collaterally. 2 Mart. N. S. 292. 2 La. 590.

The will itself has been attacked as containing a substitution or

fidei commissum, which, it is urged, renders void the legacy made in favor of the petitioner. We have attentively considered the several provisions of the will, and cannot discover in them the features of a substitution, which is defined to be, "a disposition by which the donee, the heir, or legatee is charged to preserve for, or to return a thing to a third person." Civil Code of 1808, p. 216, art. 40. The testator, here, does not leave the property to his sister with a charge to preserve it for, and surrender it at any time, to her children. She has, on the contrary, the entire control and disposition of it, to maintain herself and children, to educate them, and to do all that she may think the interest of herself and her children requires. Under such a provision, if the funds remaining after paying the debts were barely sufficient to defray the expenses of bringing up and educating her children, she was surely authorized to expend every dollar of such balance. How then can such a bequest be termed a substitution. It would seem that the testator intended either a joint legacy for the benefit of his sister and her children, or a legacy to her burdened with dispositions or conditions in favor of her children. Having survived all her children she has inherited their portion of the legacy, or has been relieved of the burdens imposed upon her by the bequests. In relation to substitutions, the rule is well settled in our jurisprudence, that they are never presumed; and that unless a clause in a will necessarily presents a substitution, and cannot be otherwise understood, it will be maintained and carried into effect. 4 Mart. N. S. 45. 7 Ib. N. S. 417, 4 La. 504.

Our attention has next been called to the charge given by the judge on the plea of prescription, which is said to be erroneous. He instructed the jury that if the defendant being deputy sheriff, purchased the land at a sale made by himself, he did not hold it in good faith, and that the act of sale by the sheriff of the parish to him of the said land could not be the basis of prescription. This charge appears to us correct, and in accordance with the true spirit and rules of our jurisprudence. On general principles as well as by the laws in force in 1824, the defendant could not lawfully become the purchaser of the property he was employed to sell. By the laws of the *Recopilacion* the prohibition to purchase at a judicial sale extended to all the officers of the law, even when

the sale was not made by them. L. 24. T. 8. B. 2, and L. 13. T. 4. B. 3. *Curia Philip. B. 1st, Com. Terreset*, Chap. 4. No. 16, *verbo* Factory. 11 Mart. 297. 8 Ib. N. S. 165. 6 La. 407. 9 La. 44. 15 La. 398. Story on Agency, § 211. In order to invoke the prescription of ten years, it is not enough to show a translative title, accompanied by a possession of ten or twenty years. Good faith is an essential requisite, and must have existed at the commencement of the possession. Civil Code of 1808, p. 488, art. 72. It is good faith alone which in the eye of the law purifies the title of its defects, and causes the possessor under a just title to be preferred to the true proprietor, who has remained so long silent and neglectful of his rights. But it is said that the good faith required by law, consists only in the belief that the person whose right we acquire, was really the true owner of the property sold. Civil Code, art. 3446, 3414. This belief is certainly indispensable to constitute good faith in the purchaser, but even where it exists there may be bad faith on the part of the latter; when for instance he has acquired, as in the present case, in violation of a prohibitory law. In such a case he knows the vices of his title as much as if it were a defect of form apparent on its face, for he cannot plead ignorance of the law. He cannot believe himself to be truly the owner of the property; he cannot have that *justa opinio quasiti dominii* necessary to prescribe. He is not, according to article 495, that *bona fide* possessor, who possesses as owner by virtue of an act sufficient in terms to transfer property, of the defects of which he was ignorant. The defendant must have known, that the sale he made to himself was a nullity, which did not transfer the property to him, as the law allows no civil effects to acts which it prohibits. The nullity which exists in the defendant's title is an absolute one, founded on public policy and good morals. It was established, say the Spanish jurists, to avoid frauds. After laying down the rule that such a title cannot be the basis of prescription Troplong says: "*Ainsi un contrat qui aurait une cause déshonnête, illicite, contraire aux mœurs, par exemple, l'achat d'un immeuble litigieux fait par un avoué, ne pourrait justifier la prescription de dix et vingt ans. A cet exemple, D'Argentrée assimile la donation faite par un malade*"

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658.

au médecin qui le soigne, de la maladie dont il vient à mourir ensuite ; il est facile d'en trouver d'analogues.

D'ailleurs, on conçoit aisément que celui qui mettrait à l'origine de sa possession ce cachet d'illégalité et de mépris pour des prohibitions si morales, ne serait pas de bonne foi. De la Prescription, Vol. 2, No. 905.

It is otherwise with regard to relative nullities. If the persons in whose favor they are established do not complain, the title which contains such a relative nullity is nevertheless a just title, under which prescription can be acquired. 2 Troplong, Prescrip. No. 902 to 907 and 491 to 922. As to the prescription of five years, established by the act of 1834, we have heretofore held, and have no reason to doubt the correctness of our determination, that it covers only informalities occurring in the manner of advertising and making public sales.

The judgment appealed from is said to be clearly erroneous, as it gives the whole land to the plaintiff, who at most can claim only one half of it, Samuel Leonard being entitled under the will to the other half. The will in our opinion, vests no right or title whatever to the land in Samuel Leonard. He is to receive certain amounts of money on certain contingencies, which may or may not arrive. What will be coming to him, if any thing at all, cannot be ascertained until all the property of the estate shall have been sold, and the debts of the deceased paid. The object of this suit was to bring back into the succession of J. W. Leonard, this land, to be disposed of under the will, and we do not understand the judgment as decreeing any thing more. As to the exception taken to the plaintiff's right to sue, on the ground that being a legatee under a universal title, she was bound to demand of the presumptive heirs a delivery of her legacy, according to article 1605 of the Civil Code it cannot avail the defendant. From the terms of the will, the plaintiff might well be considered as a universal and residuary legatee, charged with paying a portion of the assets of the estate to another person ; but were she viewed only as a legatee under a universal title, there was no nearer presumptive heir of the deceased than herself, to whom she could apply as having the legal seisin of the property of the estate. 5 Toullier, No. 611. No. 495.

Judgment affirmed.

THOMAS URQUHART v. ASA D. GOVE.

As a general rule no one will be presumed to have paid what he was not bound for ; and where he reclaims an amount so paid, the burden of proving that he was neither legally nor morally bound therefor, will be on him.

A contract or payment made for the purpose of avoiding litigation, cannot be rescinded for error of law. C. C. 1840.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Benjamin*, for the plaintiff.

Durell, for the appellant.

GARLAND, J. This is an action to recover \$350, alleged to be due for the rent of a store for three months, ending on the 31st October, 1840. There is no dispute as to the defendant's having had the store for the time mentioned, or as to the price ; but the latter avers that, in the month of November, 1838, he erroneously paid the plaintiff under a different contract, the sum of \$350, for the rent of the aforesaid store, which sum he claims should be re-paid to him, or compensated against plaintiff's demand.

The facts seem to be as follows : One J. B. Colla had rented the store for one year, ending on the 31st of October, 1838, and had paid the rent for the first three quarters of the year, at the rate of \$1400 per annum. Colla avers that about the 5th of July, he rented the store to the defendant, for the remainder of his term, for \$340, upon condition that the plaintiff would consent. Gove applied to the agent of the plaintiff, who says, that having understood from Colla that the defendant was to take the store, and he having asked his (the agent's) consent, he gave it. It does not appear that there was any understanding between the agent and the plaintiff, that the defendant was to settle the rent with Colla, and that the plaintiff was to look to him. In November, 1838, the plaintiff sued Colla for the rent, and about the same time notified the defendant that he looked to him for it also, as he did not expect to get the money from Colla. On the 19th November, 1838, Colla and defendant having an account current with each other, had a settlement, in which the \$340 for rent was included, and a balance still remained in favor of the defendant. Colla

says that he always considered himself responsible to the plaintiff for the rent. On the 26th of November, 1838, the defendant paid the plaintiff the last quarter's rent supposing himself to be responsible, and under a threat of seizure of his goods, as he says. The defendant rented the store for two years after this, and paid the rent without complaint, until in the last quarter of the second year ; when, having consulted with counsel, he was told that he had erroneously paid the money in November, 1838, and was advised to resist the payment of a quarter's rent, about which there was no dispute, for the purpose of setting up the demand he now does.

In the lease from Urquhart to Colla is a clause which declares, that the latter shall not sub-lease the premises, without the consent of the former.

In the inferior court, after a mis-trial, there was a verdict in favor of the plaintiff, and the defendant has appealed.

In this action, the defendant stands on his demand in reconvention, as a plaintiff, and must make out his case.

As a general rule, no one is presumed to pay what he is not bound for, and when he reclaims it, the *onus* is on him to show that he was neither legally nor morally bound for the sum he has paid. He must show the error of law or fact, that induced the payment. A long delay in asserting the error, when there are continued transactions and accounts, is a circumstance to be considered ; and demands or defences founded upon alleged error in old settlements, or erroneous payments, ought not to be encouraged, as they lead to litigation, and produce uncertainty in relation to past transactions. Had the defendant, in 1838, resisted the demand which he paid, we think it highly questionable whether he could have been compelled to pay it. He says in his answer that he paid it under a threat of judicial proceedings and a seizure of his property. The plaintiff further notified him, previous to his settlement with Colla, that he should hold him responsible for the rent, and make him pay it. Under these circumstances, it appears to us that the clause in article 1840 of the Civil Code, which provides that "a contract made for the purpose of avoiding litigation, cannot be rescinded for error of law," is conclusive. If an agreement to pay, for the purpose of avoiding litigation, could

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not be avoided for error of law, it is difficult to see how money paid for a similar purpose could be recovered back again, upon the same ground.

Judgment affirmed.

JOHN BAILEY and another v. HENRY G. HEARTT.

APPEAL from the District Court of the First District, Buchanan, J.

Perin, for the plaintiffs.

C. M. Jones, for the appellant.

MARTIN, J. The plaintiffs claim \$1008 for the hire and use of certain blocks, &c., furnished to the defendant for raising the steamer Cuba, according to an account annexed to the petition. The defendant pleaded the general issue; and farther, that the plaintiffs libelled the brig *Damon*, for the hire of the same, or like materials, claiming only \$125, and were nonsuited.

Several witnesses were examined, and from their testimony the court concluded that the plaintiffs were entitled to \$125 for the use of the blocks, &c., &c.; and for necessary repairs, to \$115, \$4 50, and \$10, in all \$254 50 for which judgment was given. We are unable to see on what grounds we can interfere with it, or allow damages for the appeal.

Judgment affirmed.

THE FIRST CONGREGATIONAL CHURCH OF THE CITY AND PARISH
OF NEW ORLEANS v. ANN HENDERSON.

No action can be maintained on an agreement entered into with a view to contravene the general policy of the law. The illegality of a contract, arising from transactions in *fraudem legis*, may be always opposed by the party who wishes to recede from it.

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Defendant's ancestor bequeathed \$2000 a year, for five years to plaintiffs, to commence five years after his death. At the time of the bequest and of the testator's death, plaintiffs were prohibited by their charter, from receiving any legacy exceeding \$1000; but this restriction was removed by an act of the legislature before the first annual payment became due. A compromise having been entered into between the heirs and legatees, by which it was stipulated that a certain amount should be paid to plaintiffs by the heirs, in satisfaction of their legacy, this action was commenced to recover the portion due by the defendant. *Held*, that plaintiffs can only take \$1000; that the term fixed by the testator for the payment of the legacy, cannot be assimilated to a condition; that in the former case the right is acquired and perfect, the exercise of it being only suspended, while in the latter, it is uncertain whether the legatee will ever be able, in consequence of the condition, to claim the legacy; that in the first case, the right could not be acquired by a person incapable at the testator's death; but that in the second, the capacity is only required to exist at the time of the accomplishment of the condition; (C. C. 1459, 1460, 1691, 1692;) and that the want of capacity at the death of the testator could not be removed by subsequent legislation, which can only be prospective in its operation.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Micou and *Eustis*, for the appellants.

Grymes, for the defendant.

SIMON, J. The plaintiff seeks to recover of the defendant, here represented by her agents, and attorneys in fact, W. C. Milne and M. M. Thompson, the sum of \$3000, which is alleged to be due under the following circumstances. It is averred that by the will of the late Stephen Henderson, who died in March, 1838, the petitioners, under the denomination of Clapp's Church, were instituted one of the particular legatees of the deceased. That said will was duly admitted to probate; and that a short time afterwards, a suit having been instituted by Ann and John Henderson, in the Court of Probates of the city of New Orleans, on the allegations that the legacies made to the petitioners, and to certain other corporations were void in law, and with a view to claim the whole estate of the deceased, the petitioners filed their answer to said suit, in which they alleged the grounds on which the will of the deceased should be maintained, and the pretensions of the plaintiffs defeated. That, in April, 1839, John, Ann, and Stephen Henderson, jr., and other persons and corporations, legatees, and parties to said suit, to prevent further litigation, entered into a

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certain act of compromise, to which the petitioners were not a party, but before signing which, certain of the corporations therein interested, agreed with John, Ann, and Stephen Henderson that, in lieu of becoming a party to said act, the petitioners' interest in the estate should be provided for, by the said John, Ann, and Stephen, each paying to the petitioners a sum of \$3000, which, for other considerations, they and each of them promised to pay in annual instalments, to be due in January, 1841, 1842, and 1843; in pursuance and in consideration of which, the compromise was executed, without any further objection on the part of the petitioners. That John, Ann, and Stephen Henderson well knew, at the time of the compromise, that the charter of the petitioners restricted the amount which they might receive by donation or testament; that the contract was made to settle the suits then pending, and to avoid further litigation; and that the restriction has since, by law, been removed. That Stephen Henderson complied with his agreement by delivering his three notes, one of which has been paid; but that John and Ann Henderson have totally refused to do so.

The defendant, by her attorneys in fact, pleaded the general issue, and specially denied her being bound to pay to the petitioners the sum by them demanded, or that any such promises were made by her, or by any person having authority to bind her in the premises, as in the petition she is alleged to have made.

There was judgment below in favor of the defendant, from which the plaintiffs have appealed.

It appears from the evidence, that among the testamentary dispositions contained in the will of the deceased, he gave a legacy of \$2000 per annum, for five years, to the plaintiffs, to commence five years after his death. The heirs of the deceased, who resided in Scotland, and were aliens, instituted a suit in the Probate Court, as alleged in the petition, which was resisted by the plaintiffs and the other corporations, who attacked and disputed the right of the Scotch heirs to the inheritance claimed by them. Terms of compromise were proposed; and after divers communications and conversations between the parties, in which it appears that the pretensions of the plaintiffs were carried to the extent of \$12,000, over and above the sum of \$1000 assumed to be paid to

them by the other corporations, an act of transaction was finally signed by all the interested parties, except the plaintiffs, who were not made parties thereto. This transaction, or compromise, was made the basis of the judgment of the Court of Probates subsequently rendered.

The testimony of the several witnesses who were examined on the trial of this cause below, shows that the claim set up by the plaintiffs under the will, was the only matter that interfered to prevent the completion of the compromise. Their attorney insisted upon their being allowed \$12,000, besides the \$1000 mentioned in the act; and this became a subject of discussion between the plaintiffs' attorney, and Judge Rost, and Stephen Henderson, jr., two of the heirs. The terms insisted on by the plaintiffs' attorney were acceded to by Judge Rost, who consented to pay his fourth, (\$3000) by instalments of one, two, and three years; as also by Stephen Henderson, who subsequently gave his notes in accordance with the agreement. Messrs. Rost and S. Henderson accordingly went to W. C. Milne's counting house, and stated to him what was required of his constituents. He appeared to be much occupied, but finally said that as Mr. Henderson's interest was the same as that of his constituents, "*he would do as Henderson did in the matter.*" This arrangement was considered as highly important to the heirs, as it was for their interest that the compromise should be signed. This result was communicated to the plaintiffs' attorney, who thereupon consented that the transaction should be signed, and it was so signed by all the parties, except by the plaintiffs, who according to the understanding, were left out of the compromise.

William C. Milne, who was also examined as a witness, testifies that he has no recollection of the visit of Messrs. Rost and Henderson, and that he had so many interviews with them that he cannot recollect the particulars. He has no recollection of ever agreeing to pay any other specific sum, beyond the \$1000. After consulting his partner and his counsel, his impression was that no such agreement had been made. He states also that he never communicated with Ann Henderson on the subject of the legacy claimed by Clapp's Church; but that it was considered advisable to send the act of compromise to Europe, to be ratified

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by the heirs; and that such ratification was procured after the lapse of some months.

In addition to the foregoing substantial and concise statement of the evidence, it is proper to remark here, that the reason why the plaintiffs were left out of the compromise, was, (as we are induced to suppose,) owing to their incapacity to receive more than \$1000, under the charter of incorporation, which (see acts of 1833, page 30,) contains the following provision: "That said corporation shall not be authorized to accept of any donation or legacy exceeding one thousand dollars from any one individual, and should a larger sum be bequeathed by any person by last will and testament, the same shall be reduced to the aforesaid sum of one thousand dollars, and the residue shall be distributed among the heirs of such testator." This incapacity was removed, however, by a law of 1841, (see acts of 1841, page 45,) amendatory of the former act, which contains this clause: "said corporation may receive by legacy, donation *inter vivos* or *mortis causa*, any lot or tract of land, for the purpose of erecting a church thereon, or any other legacy or donation, provided that the value collectively shall never exceed the sum of one hundred thousand dollars; and that all laws or parts of laws to the contrary be, and are, hereby repealed."

From the facts disclosed by the evidence, it is obvious that the object of the agreement upon which this action is based, was to give effect *indirectly* to the legacy made to the plaintiffs by the testator. The parties well knew, that the corporation could not legally set up any claim to the liberality of the deceased, above the sum of \$1000, and that the incapacity could not be cured by the compromise. At the time it was passed, such incapacity had not been removed; and the payment of the sum of \$1000, made to the plaintiffs, would have prevented any further interference on their part with the right or claims of the other heirs or legatees; and we cannot view the agreement relied on, in any other light than as an attempt to carry the legacy into effect. Although, morally speaking, it was perhaps a very commendable and praiseworthy act on the part of the other legatees, who endeavored to give effect to the last will, and expressed intention of their benefactor, by making the sacrifice of a portion of their legacies in favor of an

institution of public utility ; still, it suffices, that one of the obligors from whom it is demanded, refuses to execute it, to make it our duty to examine whether or not, legally speaking, he can be bound to comply with his obligation, or in other words : whether the agreement sued on, taking for granted that it has been satisfactorily established, is binding and obligatory upon the defendant ?

It behoves us therefore to inquire : 1st. Into the legality of the consideration or motive for making the contract or agreement sued on, in reference to the then existing incapacity of the plaintiffs to receive under the will.

2d. Whether said incapacity having been removed since the death of the testator, but before the first instalment of the legacy became due this circumstance can entitle the plaintiffs to recover the whole amount of the bounty, and thereby give effect to the present action against the defendant, under the agreement.

I. The plaintiffs were clearly incapable of accepting any legacy above the sum of \$1000. Any liberality above that amount was forbidden by express law ; and as we have already said, the object of the agreement was to defeat the provision of the law, as contained in the charter of incorporation. Now, the 1887th art. of the Civil Code says that, "an obligation with an unlawful cause can have no effect ;" and "the cause is illicit, when it is forbidden by law," art. 1889. Merlin, (*Questions de Droit, verb. Causes des Obligations*, § 1, art. 2,) says ; "*Une cause illicite est, en fait d'obligations, considérée comme non-existante ; ainsi, toute cause qui blesse une loi prohibitive, vicie l'engagement auquel elle a donné lieu.*" It follows, therefore, that the illegality of a contract arising from transactions *in fraudem legis*, can always be opposed by the party who wishes to recede from it ; and that an action grounded on an engagement entered into with a view to contravene the general policy of the laws, cannot be maintained. These well known principles, often recognized in our jurisprudence, are fully applicable to the agreement under consideration, and we concur with the judge *a quo* in the opinion, that the agreement was intended to carry the prohibited disposition into effect, and was not only without any legal cause or consideration, but had for its basis an illegal one.

II. It has been urged that the term imposed by the testator for

the payment of the legacy, is in the nature of a condition; that under the 1460th art. of the Civil Code, "when the donation depends on the fulfilment of a condition, it is sufficient if the donee is capable of receiving, at the moment the condition is accomplished;" and we have been referred to the case of the succession of *Alex. Milne*, 17 La. 46, as containing principles applicable to the question at issue. In this case, it is true, that the testament was opened on the 14th of March, 1832, that the incapacity was removed on the 5th of March, 1841, and that, therefore, five years had not quite elapsed between the period of the opening of the will and the removal of the incapacity. Thus, it is insisted, that the legatee was capable of receiving at the time that the first instalment was to be paid, and this is all that the law requires. But the term, in our opinion, cannot be assimilated to a condition. The payment of the legacy to be made at a certain period, was only delayed, without its depending upon any uncertain event, which was to happen or not at the expiration of the five years. But even supposing that it could be taken as a protractive, and not as a suspensive condition, it is clear, that under art. 1692 of the Civil Code, which declares that, "a condition which, in the intention of the testator, does but suspend the execution of the disposition, does not hinder the instituted heir or legatee from having a right acquired and transmissible to his heirs," such delay could not prevent the legatee from considering the sum given as his absolute property, and from transferring his title thereto, perfect at the time of the opening of the will, to any other person. The distinction made by our law, (Civil Code, arts. 1459, 1460, 1691, and 1692,) is perfectly clear. In the one case, it is unknown whether the legatee will ever be able, from the condition imposed, to claim the legacy, and his capacity is only required to exist at the time of the accomplishment of the condition. In the other, the right is acquired, and perfect, but its exercise is only suspended until the expiration of the term. It is obvious, that in the latter case, the right could not be acquired by an incapable person. Toullier, (vol. v. No. 94,) says: *Si la condition était plutôt un terme qu'une condition; si elle était dilatoire seulement et non suspensive; dans ce cas, qui revient au cas des legs purs et simples, c'est à l'époque de la mort du testateur qu'il faut con-*

sidérer la capacité du légataire." Ib. No. 276, note 1, and 673, 674, 675, 676. Grenier, Donations, No. 142. And Dalloz, *verb.* Dispositions entre-vifs et testam. ch. 2, v. 11, § 8, who says: "*Le droit dans ce cas commence au décès du testateur ; c'est donc à cette époque que la capacité du légataire est requise.*" These principles, which appear to us incontrovertible, and are in perfect harmony with the provisions of our law, are fully applicable to the disposition which gave rise to the agreement upon which the present action is based. The plaintiffs could not take under it more than \$1000, which was the utmost extent of his capacity at the time of the death of the testator ; and although the payment of the legacy was delayed for five years, by the terms of the will, and although the First Congregational Church, originally incompetent to take the whole amount of the bequest, was, by the statute of 1841 invested with ability before the happening of the period at which it was demandable, we cannot hesitate to say that in this case, the want of capacity at the death of the testator, resulting from a positive statutory prohibition then in force, cannot be supplied, cured, or removed, by any subsequent legislative enactment, which can only be prospective in its operation. The case referred to, (17 La. 46,) has, in our opinion, no application to the present one ; and, however desirous and disposed we might be to carry into effect the benevolent intention of the testator, we are constrained to come to the conclusion that the plaintiff is not legally entitled to recover.

Judgment affirmed.

JAMES CASSIDY v. HIS CREDITORS.

APPEAL from the District Court of the First District, Buchanan, J.

Grivot, for the syndic.

Greiner, for the appellant.

MORPHY J. In April last, this case was before us on an opposition of William J. Moffat, to the tableau of distribution filed by

the syndic. It was then remanded for further proceedings, there being no evidence in the record, that the mortgage given by the insolvent to secure the note of \$1000 held by the opposing creditor, had been recorded so as to be binding and valid as to third persons. See 2 Robinson, 47. It now comes up with a certificate from the Recorder of Mortgages, which shows that the act of mortgage was duly recorded two days after its date, and thus completes the evidence necessary to render the opposition successful. The judge of the inferior court accordingly ordered Wm. J. Moffat to be placed on the tableau of distribution as a mortgage creditor, but to be paid only after the privileged claims therein set forth.

From this judgment Moffat has appealed, being dissatisfied with that part of it which orders his mortgage to be paid after the privileged claims; and the syndic has joined in the appeal, praying for the reversal of the judgment, and the dismissal of the opposition.

So far as relates to the claim of Wm. J. Moffat, as a mortgage creditor, the testimony adduced sustains in our opinion the judgment appealed from; but it appears that, in the contest relative to the note of \$1000, which formed the most important item of the tableau of distribution, the balance of the opposition was lost sight of, in which the several charges and privileged claims were specially opposed, and their existence denied. These charges and claims amounted to \$488 75, of which only one item, of \$100 was supported by any evidence. As these claims are ordered to be paid in preference to the appellant's debt, he was surely entitled, under his opposition, to require some proof of their correctness. Most of the costs charged to the estate are represented to have been incurred by P. Rivière, the present syndic, in an opposition which he had previously made to the insolvent's discharge on the ground of fraud, and which had been dismissed; and in a number of rules taken by other creditors, and discharged at their costs. We have been asked to strike out all the charges for costs in the tableau, which have not been proved. This we cannot do without committing injustice, as we know that the estate cannot have been settled without incurring some law charges, which must be paid out of the proceeds of the slave mortgaged to the

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appellant, in case they exceed the sum of \$175, which appear to be the only funds in the hands of the syndic, independent of such proceeds. Civil Code, articles 3233, 3236. Under such circumstances, we think that the case should be once more remanded. Of this the appellant cannot complain, as by examining the Clerk and Sheriff he could, himself, have ascertained, what proportion of the costs was improperly charged to the estate; and as, on the first appeal in this case, he was allowed an opportunity of showing the registry of his claim, the existence of which appeared to be the only thing in dispute below.

It is therefore ordered that the judgment of the District Court be reversed, and that this case be remanded for further proceedings according to law; the costs of this appeal to be borne by the appellee.

CHARLES W. PHILLIPS v. BENJAMIN F. HAWKINS.

On a rule against the sureties on a bail bond, (taken under the act of 28 March, 1840, supplementary to another act approved on the same day,) conditioned that the principal shall not depart from the state for the term of three months without leave of court; or, in case of such departure without leave, that the sureties shall pay the amount for which definitive judgment may be rendered, the plaintiff must show that the principal has left the state within the three months in violation of the bond, or he cannot recover.

APPEAL from the District Court of the First District, *Buchanan, J.*

L. C. Duncan, for the plaintiff.

W. M. Randolph, for the appellants.

SIMON, J. The appellants, Lambeth and Thompson, are sought to be made liable as sureties of the defendant Hawkins on a bail bond by them subscribed, under the first section of an act of the legislature, entitled "an act supplementary to an act entitled an act to abolish imprisonment for debt," approved March, 28th, 1840.

On the motion of the plaintiff's counsel who obtained a rule to that effect in the court below, and on the production of the sheriff's

return, of "no property found" on the writ of *feri facias* which had been issued against the defendant, the appellants were condemned to pay the sum of \$5250 with interest, being the amount of the judgment previously rendered against said defendant, and for which an execution had been issued. From the judgment on the rule the sureties have appealed.

It is contended by the appellants : 1st. That by the terms of their obligation, and of the law under which it was taken, they can only be made liable on their bond upon proof of the principal obligor's having departed the state within the term of three months.

2d. That there is error apparent on the face of the record—that judgment was rendered by the court *a qua* for more than the plaintiff claimed or proved.

I. The law relied on (Bullard & Curry's Digest, p. 475, No. 16,) says ; that "*the condition of the bond to be given by a debtor, who shall have been arrested by his creditor, shall be, that the debtor shall not depart the state for the term of three months, &c.*" The bond or obligation under consideration, was received by the sheriff on the 7th of May, 1841, and stipulates the condition under which the appellants consented to be bound, in the very terms of the statute, with the further stipulation, that "*in case of the debtor's departure without leave of the court, the sureties shall pay to the sheriff the amount for which definitive judgment shall be rendered in the cause, &c.*" This bond was, before judgment, regularly assigned to the plaintiff.

Now, it seems to us that according to the doctrine recognized in the case of *Sompeyrac v. Cable*, 10 Mart. 363, "the bond taken requires proof of the defendant's departure from the state ;" and the plaintiff has only shown that a writ of *feri facias* was issued against the principal debtor, which was returned "no property found." This evidence was clearly insufficient to fix the sureties' liability under their bond, as the departure of Hawkins from the state is the only circumstance upon which the right of recovery depends. It was the duty of the plaintiff to establish the fact, that the debtor had left the state within three months after his arrest. The *onus probandi* rested upon him ; as, according to the rules of evidence, the sureties could not be called upon to prove a negative, viz. that

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the principal obligor did not depart the state. 1 Starkie, 376. 1 Phillips, 198. 11 Mart. 6. Ib. 194. 3 La. 86. We are of opinion that the plaintiff has not shown himself entitled to recover.

II. The judgment appealed from was rendered for \$1000 more than was claimed by the plaintiff in his original and amended petitions. His claim was founded upon two notes found in the record, the amounts whereof correspond with the prayers of both petitions; and no evidence was adduced below to establish any larger claim. The two notes sued on amount together to \$4250 with interest, and judgment was erroneously rendered against the principal obligor for \$5250. It is clear, that the appellants could not be bound to pay more than was really due to the plaintiff; and that, had the latter succeeded in establishing the sureties' liability on the bond, the error complained of should be corrected.

As the case stands, however, the judgment appealed from must be wholly reversed; and ours must be one of nonsuit against the plaintiff.

It is therefore ordered, that the judgment of the District Court be annulled, and reversed, and that ours be for the appellants as in case of nonsuit, with costs in both courts.

RICHARD HAGAN and another v. THEIR CREDITORS.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. The Second Municipality of the city of New Orleans is appellant from a judgment, making absolute a rule to show cause why they should not pay to the syndic of the creditors of the ceding debtors \$3315, the proportion of their contribution on the properties purchased by them.

The appellee has moved to dismiss the appeal, on the ground, that there is no bill of exceptions, statement of facts, or assignment of errors. This motion cannot prevail, because the Judge has certified that the record contains all the evidence on which

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the case was decided below, and that suffices to enable us to examine it on its merits.

It appears that the Municipality was set down as a mortgage creditor, and became the purchaser of the mortgaged premises for about \$32,000. It had also the vendor's privilege on the lots as the assignee of the Frerets, of whom they had been purchased by one of the insolvents. In the cases of *Lauve v. His Creditors* and *Monrose v. His Creditors*, (not yet reported,) we held that the creditor, holding the vendor's privilege, is not liable for a share of all the charges of administration. In the present case the record does not enable us to say whether the appellant be liable, or not, for the full amount demanded; and justice, in our opinion, requires that the case should be remanded for a new trial. No notice appears to have been taken of the rule by the counsel of the municipality, and it was tried *ex parte*. The amount claimed is more than ten per cent upon the sum for which the lots were sold, and bought in by the municipality.

The judgment of the Commercial Court is therefore reversed; and it is further ordered that the case be remanded for a new trial, and that the costs of the appeal be paid by the appellee.

Rawle, for the appellant.

L. Peirce, for the syndic.

JOSHUA HANNA v. ABRAM AUTER and others

The provision of the tenth section of the act of 28 March, 1840, abolishing imprisonment for debt, that the failure by a debtor "to pay over money received, or collected for, or deposited with him for another" shall be held presumptive evidence of fraud, cannot be applied to the case of a partner who has received and refuses to pay over money belonging to the partnership, and who is not liable for any specific sum, but only to account as a managing partner. It applies to those only who, having received money for another, without authority to dispose of it, fail to pay it over to the right owner.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
McHenry, for the appellant.

Micou, for the defendant and appellee Auter.

MORPHY, J. The plaintiff has appealed from an order setting aside a writ of arrest obtained against the defendant Auter, under the act of assembly entitled "An act to abolish imprisonment for debt," approved March 28th, 1840. The suit was commenced by a seizure and sequestration of the steamboat Mazeppa, and all the books, money, and assets belonging to the said boat. The grounds for this proceeding, as set forth in the petition, were, that the defendant Auter, who had an interest only of one-eighth in the boat, one-half of which belonged to the petitioner and the balance to Dixon Birch and Peter Cockburne, had been placed in the command of the boat as Captain or Master, but with the understanding and agreement that the petitioner should place a clerk on board, whose duty it should be to act as chief clerk and book-keeper; that from the time the Mazeppa began to run, the clerk whom the petitioner put on board continued to act and perform the duties, as such, up to the 15th of October, 1842, when the defendant Auter, without any just cause, illegally and violently ejected him from his office, and took the account books of the boat into his possession, together with the money and assets belonging to the same; that although the boat has been doing a fair business from the time she began to run, the petitioner has never received one cent of her earnings, and has been refused any voice in the management of her by Auter, who has also refused to render any account of said earnings, which he was converting to his own use, &c. The petition concludes with a prayer that the defendant Auter may be decreed to render a strict account of the money made by the boat, from the time he took charge of her; that he be ordered to pay to the plaintiff \$5000 for his share of the same as half owner; that a dissolution of the partnership existing between the several co-proprietors be pronounced; and that the boat be sold for cash, &c. A few days after, a supplemental petition was filed, alleging that at the time of issuing the sequestration there was on hand in cash belonging to the boat \$1619 09, exclusive of passage and freight money earned by her last trip to and from Vicksburg to this city, amounting to more than \$1200, and that when the sheriff notified the defendant Auter, of the order put into his hands, to seize the Mazeppa, her books, money, &c., Auter delivered to that officer \$300 in uncurrent Mississippi bank notes, declaring that there was no

other money belonging to the boat than that so delivered ; that notwithstanding that the sum of \$2819 09, in the hands of the defendant Auter, or under his control at the time of the sheriff's demand, was the property of the owners of the boat Mazeppa, in which the defendant Auter held only, an interest of one-eighth, he fraudulently concealed the same, and refused to surrender it to that officer, who was authorized to seize and sequester all the money and effects belonging to the boat. The supplemental petition, after other allegations not material to be stated, concludes by praying for orders of attachment and arrest against the defendant Auter, the latter of which orders was set aside as aforesaid, on the ground that the allegations, contained in the plaintiff's petitions and affidavits, presented no legal ground to justify the granting of the same.

The judge in our opinion, did not err. The 10th section of the act of 1840, should be strictly construed, as all penal statutes are, and should not be extended to cases not clearly coming within its purview. It provides in relation to a debtor who has not made a voluntary surrender of his property to his creditors, or has not been proceeded against for a surrender, that certain of his acts shall be held presumptive evidence of fraud, and among other acts or omissions, that of "failing to pay over money received, or collected for, or deposited with him for another;" and the 13th section of this law pronounces an imprisonment, not exceeding three years, against any debtor found guilty of defrauding his creditors in any of the ways mentioned in the tenth section. To extend the above cited provision, to the present case, would be rendering it applicable to every one in which one person is authorized to call upon another for a settlement, or rendition of account. The defendant Auter, is not liable for any specific sum received by, or deposited with him, for the plaintiff's account. His obligation is to account as a managing partner. It may turn out that although he received the sums set forth in the supplemental petition, he owes no part of it to the petitioner, as the whole amount may have been rightfully employed by him in the payment of the debts and expenses of the boat. The law was intended for those persons who, having received money for another, and being without any authority to dispose of the same, should fail to pay it over to the rightful owner. Such a failure is declared to be presumptive

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evidence of fraud, and authorizes the arrest of the debtor; but a partner, or any other person acting in a capacity which gives him the control and disposition of the funds received, cannot be considered as failing to pay them, until he has rendered an account of his administration, and the sum for which he is liable has been ascertained.

Judgment affirmed.

JAMES L. BOGART and another v. BERNARD DONLIN.

APPEAL from the City Court of New Orleans, *Collins, J.*

T. A. Clark, for the plaintiffs.

L. C. Duncan, for the appellant.

MORPHY, J. This action is brought by the payees against the drawer of two promissory notes, which appear to have been in renewal of other notes, and given for a balance due on the price of fifty-eight barrels of tallow bought by the defendant from the plaintiffs on the 31st of December, 1841. The defence set up is a partial failure of consideration owing to the very inferior quality of twenty-one barrels of the tallow. The court below rendered a judgment in favor of the petitioners, from which the defendant took this appeal.

It is not shown that at the time of the sale any representations were made by the sellers as to the quality of the article. It appears to have been purchased by the defendant, only after he had inspected it to his satisfaction, and found it to be of good quality. All the witnesses examined here agree, that the tallow appeared to them good, and that it exhibited no unusual or bad smell. On the other hand, testimony taken under a commission in New York, to which place the lot had been shipped, shows that twenty-one of the barrels contained tallow of inferior quality, and exhaling the most offensive smell, and which sold at two cents per pound less than the balance. The witnesses, there, were of opinion that the tallow could not have been injured on the voyage. They even express the belief, that tallow of inferior quality was put in the

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middle of the barrels, and concealed by good tallow being placed at each end of them. This testimony when taken in connection with the correspondence of some of these witnesses with defendant, and the other circumstances of the case, is by no means conclusive as to the deceit supposed to have been practiced; but even if such had been the case, the defendant, not having shown at what price he bought the tallow from the plaintiffs, we would be without the means of fixing what deduction should be made from the purchase money. In *Brown et al. v. Duplantier*, 1 Mart. N. S. 313, we held that, in a case of this kind, the measure of damages should be the difference between the price given, and that which would have been given had there been no deception. The testimony taken on the trial shows, that at the time of the sale, the indications of bad quality, which the witnesses, in New York, say were so apparent on the arrival of the tallow there, did not exist here. The inferior judge was of opinion that the tallow must have been injured by some accident on the way. However this may be, the evidence does not enable us to say that he erred in the conclusion to which he arrived, and to disturb the judgment appealed from.

Judgment affirmed.

THE COMMISSIONERS OF THE EXCHANGE AND BANKING COMPANY OF NEW ORLEANS v. BEIN and another.

APPEAL from the District Court of the First District, *Buchanan, J.*

L. Peirce, for the plaintiffs.

Wray, for the appellant.

GARLAND, J. This suit is brought on a promissory note for \$16,000, drawn by Catharine Bein, to the order of her co-defendant, and endorsed by him. In the note, it is said to be secured by a pledge of 640 shares of the stock of the bank. The note was protested for non-payment. A judgment by default was taken against the defendants, which was made final, on proof being

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given of the signatures of the parties, and of the protest and notice thereon. From this judgment, Catharine Bein, representing herself to be the wife of John D. Bein, has appealed, and he authorizes her to do so.

There is no evidence in the record to show that Catharine Bein, is the wife of John, except that the sheriff in his return on the citation directed to her, says that he has served it "by delivering the same to her husband, John D. Bein in person;" and the notice of judgment is returned, that it was served "on John D. Bein, by leaving the same at his domicile, with his wife." The petition of the plaintiffs, and the note are silent as to the relationship existing between the parties.

In this court, the appellant urges that she is a married woman, not separated from bed and board from her husband, and that she could not appear as a party to the suit without his authorization, or that of the court; and that not being so authorized, the judgment by default was improperly made final. Her counsel further urges, that the note sued on is drawn by the wife in favor of the husband, and by him endorsed to the bank. He avers that the note was a nullity in the hands of the husband, and that the rights of the plaintiffs are no better than his.

As to the objection that the appellant was not authorized by her husband, or the court, to appear and defend the suit; we think there is but little force in it. If she had been desirous of appearing, it is probable that she could have obtained the consent of her husband, had she solicited it, to appear and defend the suit, as easily as she procured it to take this appeal.

The second ground taken by the counsel is much more serious in its consequences. From the return of the Sheriff on the process, we are bound to believe that Catharine Bein is the wife of John D. Bein; otherwise, there has been no legal service of a citation on her, and the judgment by default must be set aside and reversed. Taking it for granted, that the defendants are man and wife, we are unable to see in what way the judgment can be sustained. The note sued on was intended to be a stock note; the counsel for the defendant admits it was so. The act of pledge is not in the record, nor is there sufficient evidence to enable us to say, whether the contract comes within the meaning of that pro-

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vision of the charter, which authorizes a married woman to bind herself with her husband. Acts of 1835, p. 203, sec. 26. The 20th section of the same act authorizes the cashier of the bank to receive and execute acts of pledge on stock, or other rights and credits, to secure money borrowed. It is therefore certain, that other evidence is in the possession of the plaintiffs; and we think it just, to enable them to put all the facts of the case upon the record, to remand the case for a new trial, before we come to any conclusion on the question, whether the appellant is bound at all on the note.

The judgment of the District Court is therefore annulled and reversed, and the cause remanded for a new trial; the plaintiffs paying the costs of the appeal.

THE STATE V. THE JUDGE OF THE COMMERCIAL COURT OF
NEW ORLEANS.

Where an inferior judge refuses to try a cause at issue between the parties, on the ground that others unknown, may be interested, and should be made parties, a mandamus will be granted to compel him to proceed. If those who are interested and informed of the proceedings, do not appear to protect their rights, they must bear the consequences; and those who are neither parties nor privies to the proceedings cannot be affected by the judgment.

RULE to show cause why a mandamus should not be issued to the Judge of the Commercial Court of New Orleans, directing him to proceed with the trial of the case of *Heath v. Bein and Husband*.

Elmore and King, for the applicant.

Watts, Judge of the Commercial Court, and

Eggleston, for the defendants below, opposed the rule.

GARLAND, J. Robert Heath commenced an action in the Commercial Court, as the endorsee of a promissory note, against Mary Bein the maker, and Richard Bein, her husband, as the endorser. The former for answer alleged that she had given the note for a debt owing by her husband, who derived the whole and exclusive

benefit of the same. She further answered, that she signed it as the surety of her husband ; that she was legally incapable of executing such an obligation in favor of her husband so as to be binding on her ; that the same is null and void ; and that her husband could not transfer to any one such an obligation, with a right of action against her. She further alleged that she had never been separated in person or property from her husband. It was also alleged, that the note was given for the semi-annual interest on a loan of money made to the husband, and she prayed to be finally discharged from all liability on the said note. On the filing of this answer, the plaintiff Heath, amended his petition, and alleged, that the note sued on was one of a series of notes given for the interest on a loan of ten thousand seven hundred and eleven dollars and seventy-one cents, made to said Mary Bein for her own use and benefit, as would appear from an act of mortgage annexed. This act is in favor of Sherman Heath, and states, that he had lent Mary Bein the sum above mentioned, for her sole use and benefit, which sum is to be repaid in five years, to wit, in May, 1843 ; and that a note has been given for the amount, and ten other notes for interest, payable semi-annually, to secure all which certain property is mortgaged. The action was on the note for the ninth instalment of interest.

To this supplemental petition, Mary Bein reiterated her denial of the loan having been made for her benefit and use ; and averred that it was for money borrowed from Sherman Heath to pay her husband's debts, as Sherman Heath well knew. She also alleges, among many other matters, not material now to mention, that the plaintiff Robert Heath was an heir of Sherman Heath, who died sometime past, and was informed of all the circumstances ; wherefore she prayed the whole contract might as to her, be annulled and declared void. After the filing of the answer, Robert Heath took a rule on Mary Bein to show cause, why all that part of her answer relating to the nullity of the contract and prayer to annul it, should not be stricken out, and the defence be confined to the note sued on, as she had no right to seek to annul, any other note and act, than the one sued on. When this rule was tried, the court instead of acting directly on it, ordered " that this case stand

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over with directions to defendants to amend their answer, by making the holders of the other notes parties to this suit."

The plaintiff Heath, then offered to discontinue his suit: the defendant Mary Bein objected, and the court refused to permit him to do so, as a demand in reconvention existed. The defendants then amended their answer, alleging that the plaintiff, Heath, had the other notes in his possession. This he denied. The cause was ordered to be tried by a jury, which was called sometime after, and both parties avowing themselves ready for trial, the jury was sworn and the plaintiff Heath was proceeding with his cause; when the judge, perceiving that the holders of the other notes had not been made parties to the suit, arrested the plaintiff Heath, in the course he was pursuing; discharged the jury; and ordered the cause to stand continued until the defendant Bein, could find out the holders of the other notes and make them parties, contrary to the protestations of Heath, and without being solicited by the defendants.

The plaintiff Heath, now presents himself, alleging that the course pursued by the court below, amounts to a denial of justice: as it is the interest of the defendant Bein, never to make the holders of the notes not due, parties, or to proceed to trial; wherefore he prays that a mandamus may be issued, ordering the judge to proceed to the trial of the cause.

The Judge, in showing cause why no such writ or order should issue, recites the pleadings in the case; alleges that the act of mortgage shows that there are other notes not yet due, and that the holders of them ought to be made parties to any suit, in which the validity of the contract on which they are based is attacked. He alleges that the plaintiff Heath, has become a co-proprietor of the contract, and that as the defendants Bein attack the whole contract, all the co-proprietors ought to be made parties to the litigation, and the court ought not to proceed with the trial until every party interested shall be notified; otherwise it might happen, that two different judgments might be rendered on the same contract. The Judge avers, that this is the rule in the Chancery Courts in the other States of the Union, and in England; and he has acted upon it in this case. He states that he was not informed until after the trial commenced, that the holders of the outstand-

ing notes had not been made parties to the suit; wherefore he arrested the trial.

This application is based on articles 829, 830 of the Code of Practice, which authorizes the issuing of a mandamus to the Judge, directing him to proceed, when the delay or refusal to act in a cause amounts to a denial of justice. We are of opinion that the Judge erred in refusing to proceed with the trial of the cause, and in discharging the jury. A refusal to try a cause between parties who have made up an issue between themselves, on the ground that other unknown persons may be interested, and should be made parties to the suit, it seems to us, cannot be sustained. If other persons are interested and informed of the proceedings, the law provides a mode in which they may assert their rights. If they do not appear and protect their interests, they must take the consequences. If the holders of the outstanding notes do not become parties or privies to the pending suit, it is very certain that they will not be bound by any judgment that may be rendered in it; and although a judgment might, in the present case be given against one of the parties, yet we have no doubt the Judge of the Commercial Court, would very diligently examine into all the facts in another suit, for the purpose of doing justice between Mary Bein, and the other parties. If it be true, that Robert Heath, is the holder of the other notes, as is supposed, and, on the trial in the suit now pending, the whole contract should be annulled, so much the worse for him, as an opportunity was afforded him to take care of his rights. But if any other person, not claiming under him, is the holder of those notes, and judgment is rendered between the plaintiff and defendants, it would not be binding on such persons, unless it should be shown that they act for the use and benefit of Robert Heath.

It may also be true, as stated by the Judge, that in this case a judgment may be rendered in favor of the plaintiff Heath, and upon further investigation the whole contract be annulled. If this should be the result, it would arise from there being different testimony on the two trials; as we cannot suppose different judgments would be given on the same state of facts.

The rule must be made absolute, and the mandamus be issued.

The State v. The New Orleans and Nashville Rail Road Company.

THE STATE v. THE NEW ORLEANS AND NASHVILLE RAIL
ROAD COMPANY.

The mortgage or privilege of the State, under the act of 13th March, 1837, to expedite the construction of the New Orleans and Nashville Rail Road, authorizing a loan to the Rail Road Company on the execution of a mortgage in favor of the State to secure its repayment, does not extend to property acquired after the date of the mortgage.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Dufour*, District Attorney, for the State.
Hoffman, for the appellants.

BULLARD J. The statement of facts in this case shows: That the state caused the whole of the property of the defendants to be sold on the 20th of August, 1842, under an order of seizure and sale upon a mortgage given to the State pursuant to the provisions of the act of the Legislature, of 1838, entitled "An act to expedite the construction of the New Orleans and Nashville Rail Road." That several slaves, among other property, were sold, and brought \$6060, which were purchased by the company after the date of the mortgage. That the intervenors, Painter, Layton & Co., and Richardson & Gosslin, obtained judgments against the company, which were recorded in the office of the Recorder of Mortgages before the sale, under the order of seizure; and that they claimed to be paid by preference out of the proceeds of the sale of the seven slaves acquired after the date of the mortgage, and privilege to the state. Their pretensions were rejected, and they have appealed.

We see no substantial difference between this case and that of the *State v. The Mexican Gulf Railway Company*, recently decided, (3 Robinson, 513,) in which we held that the lien mortgage, or privilege of the state, did not extend to property acquired after the date of the act. In neither case does the mortgage extend in terms to future property, and in this respect there is no difference between the acts of 1837, and of 1838. In both cases the mortgage is essentially conventional, and does not extend to the future acquisitions of the company. The court, therefore, erred, in our

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opinion, in overruling the oppositions of the judgment creditors, who were entitled to be paid out of the proceeds of the slaves not embraced in the mortgage to the state.

It is therefore ordered and decreed, that the judgment of the District Court, so far as it relates to the opposition of George W. Painter, Layton & Company, and Richardson & Gosslin, be reversed; and it is further ordered, that the said oppositions be sustained, and that the opposing creditors be paid the amounts of their judgments respectively, out of the proceeds of the sale of the seven slaves named in the record.

SAME CASE. ON AN APPLICATION FOR A REHEARING.

BULLARD, J. Dr. Harrison and M. J. B. Harrison ask for a rehearing in this case, on the ground that they were overlooked in the judgment first rendered. There are many reasons why this should not be granted. In the first place, the record was so informal and loosely made up, that we could ascertain only by conjecture who were appellants. In the second place, no points were filed, which could enable us to see, on what the petitioners relied in support of their claims; and lastly, they did not show a judgment against the company, which established, either their demands, or that they were entitled to any privilege. The case before the District Court was not in such a state as to authorize the petitioners, having no judgment, to come in and ask to participate in the distribution of a particular fund.

The rehearing is refused.

Hoffman, for the rehearing.

FRANCIS D. NEWCOMB v. THE POLICE JURY OF EAST BATON ROUGE.

Where the inspector of roads and levees has failed to give to the absent proprietor the notice required by law of the work to be done on his levees, &c., without which the contractor to whom it has been adjudicated cannot proceed summarily to seize and sell the land, the latter may recover the amount at once of the Police Jury. Though the proprietor might be responsible in an ordinary action on a *quantum meruit*, the contractor is not bound to sue him.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

Avery, for the plaintiff.

Elam, for the appellants.

BULLARD, J. This is an action against the Parish of East Baton Rouge, to recover the sum for which the plaintiff had constructed a certain levee over land of non-residents, under a contract with the Inspector of Roads and Levees. He alleges that he became the lowest bidder at a public adjudication of the job; that the contract had been duly recorded, but that the Inspector having failed to give proper and legal notices to the absent proprietor, he had been debarred from exercising his summary recourse against the land in the manner pointed out by law; and that, by reason of the premises the Parish became liable to pay him the stipulated price. The Police Jury are appellants from a judgment sustaining his pretensions.

It is shown, that the inspector failed to give the notices to the absent proprietors, required by law. Without such notice, and a strict compliance with all the legal requisites, it is clear the undertaker is not entitled to have the land, improved by his labor, seized and sold to pay him the price of adjudication. See Bullard & Curry's Digest, page 753. 1 La. 103.

It is true the plaintiff has made no attempt to have the land seized summarily, and that the proprietor is liable in an ordinary action upon a *quantum meruit*, to pay such an amount as he has been benefitted by the work done. We are, however, of opinion that the plaintiff was not bound to do so vain a thing, as to apply for

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an order of seizure which the judge could not legally grant. It is clearly not the fault of the undertaker that the Inspector did not give the notices required by law, and he was not bound to institute an ordinary action against the proprietor, the Police Jury having engaged that he should be paid the price at which the work was adjudicated to him. 12 La. 24.

Judgment affirmed.

B. POUVERIN v. THE LOUISIANA STATE MARINE and FIRE INSURANCE COMPANY.

A consignee with power to sell, has an insurable interest; and if the consignor afterwards assent, he will be responsible for the premium, and be entitled to the benefit of the policy.

Where a vessel insured from New Orleans to Vera Cruz, on her way through Lake Borgne, touches at the Bay of St. Louis for the purpose of procuring a pilot to conduct her through Pass Christian, it will not be a deviation.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Bodin*, for the plaintiff.

S. L. Johnson and *L. Janin*, for the appellants.

GARLAND, J.* The plaintiff claims the sum of \$2000, the amount of a valued policy of insurance on goods on board of the schooner *Sarah Helen*, bound from New Orleans to Vera Cruz. The policy commences: "A. Vandricourt on account of Godet, Mordacque & Co. does make insurance," &c., upon all kinds of lawful goods, &c., and "declared to be on eighty-five barrels of almonds. In case of loss, payable to the order of A. Vandricourt." There is a clause in the policy which appears to authorize a transfer, or assignment, on condition of the assignee becoming responsible for the premium. The policy is dated June 6th, 1840, and the next day, Vandricourt, as agent of Godet, Mordacque & Co., passes it to the order of the plaintiff, who he says is the owner of

**Morphy, J.*, being interested in the question, did not sit on the trial of this case.

the merchandize upon which the insurance is to operate. It appears from the testimony, that the plaintiff purchased the almonds of Robert & Co., and contemplated consigning them to the house in Vera Cruz. He purchased on a credit of four months. In consequence of this Vandricourt, who was the agent of the house of Godet, Mordacque & Co., the consignees, made the insurance in their names. About the time of, or shortly after making the insurance, Vandricourt, on behalf of his principals, agreed to take an interest of one-half in the purchase, to be paid when plaintiff's notes to Robert & Co. should fall due, for which he was to give a note, and assign the policy of insurance. The last he did, but the note was never executed. The almonds were entirely lost at sea, and the house of Godet, Mordacque & Co. about the same time failed; wherefore, as Vandricourt states, he considered all the goods as belonging to the plaintiff, as his principals had paid no part of the price, and he had not given the note promised. Vandricourt is shown to be the agent of the house of Godet, Mordacque & Co., and at the time the insurance was effected, the almonds, according to the agreement he had made, belonged to that firm and the plaintiff, they being interested as owners for one-half, and as consignees for the other. Shortly after the news of the failure of the Vera Cruz house arrived in New Orleans, an attachment was taken out against them, and the defendants cited as garnishees to answer in relation to the policy in question. In their answer they refer to the plaintiff's claim, and say that they had received notice of the assignment to him previous to the attachment.

The answer of the defendants is a general denial; and a further averment, that if the plaintiff ever had any right to the property insured, his interest was never disclosed, but that on the contrary the same was represented as belonging to Godet, Mordacque & Co.; in consequence of which misrepresentation, or concealment, they are released from all liability on the policy. They further aver, that the plaintiff's affidavit, when he first presented his claim to the company, contained a statement at variance with the allegations in his petition, whereby he has forfeited all claim under the policy sued on.

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There was a verdict and judgment for the plaintiff, and the defendants have appealed.

It is very true, that at the time the insurance was effected, no declaration of interest was made by the plaintiff. The whole matter was attended to by Vandricourt, who was shipping a variety of articles to his principals in Vera Cruz, and took out this policy in their name, for the value of the almonds. There cannot be a doubt, that the almonds were purchased of Robert & Co. by the plaintiff, nor that he paid for them. They were sent on board the vessel by that firm, for Pouverin; and the assignment of the policy the day after it was made, shows that the parties were proceeding in good faith. The consignee of the goods had an interest that was insurable; and although in the policy, it is not said that the insurance is effected for whoever it may concern, yet we think the assignment by the agent of the assured, to the consignor, is sufficient to authorize him to maintain this action. A consignee with power to sell has an insurable interest; and if the consignor assents afterwards, he is responsible for the premium, and has the benefit of the policy. 1 Phillips Ins. 120. 1 Sergt. & Lowber, 293.

It has been alleged that the defendants, should they pay this demand to the plaintiff, would not be protected from another suit in the name of Godet, Mordacque & Co., or of their legal representatives. We think otherwise. Although there was an agreement, on the part of Vandricourt, as agent, to purchase half the almonds, yet as the note he was to give was never executed, the sale was not completed; and the policy having been assigned by the agent of the assured, we think, their rights are so far vested in the plaintiff, as to authorize him to receive the sum claimed, and to protect the defendants.

In the argument in this court, it has been urged that the evidence shows a deviation from the voyage, although no such defence was alleged in the answer. It appears that the vessel sailed from one of the basins in the city of New Orleans, or from the lake end of the Ponchartrain Rail Road, and passed through Lake Borgne, calling at the Bay of St. Louis for the purpose of procuring a pilot to conduct the vessel through the Pass Chris-

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tian. This we do not consider such a deviation as will avoid the policy.

Judgment affirmed.

GEORGE W. COPLEY v. JAMES S. BRANDER and others.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MARTIN, J. The plaintiff, appellant from a judgment against him, on a claim for professional services rendered to the defendants, has drawn our attention to a bill of exceptions, from which it appears, that the first judge, in answer to a question put to him by one of the jury, as they were moving from the box, said, that it is the duty of an attorney to record in the mortgage office, the judgments which he may obtain for his clients. The defendants did not resist the claim of the plaintiff, by the pleadings, on the allegation of his having neglected to record any judgment of theirs; but the circumstance was, in the argument to the jury, stated as a part of the defence, although no evidence was adduced in this respect. As this answer of the court may have had a tendency to influence the verdict of the jury, we have thought it best, other circumstances tending to induce the belief that the ends of justice would be promoted by a new trial, which was refused below, to remand the case; without expressing any opinion as to the correctness of the answer given by the judge to the jury.

It is therefore ordered that the judgment be reversed, the verdict set aside, and the case remanded for further proceedings; the defendants and appellees paying the costs of the appeal.

Larue, for the appellant.

Halsey, for the defendants.

THOMAS POWELL v. JOHN A. MORTON and others.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

C. M. Jones, for the plaintiff.

L. C. Duncan, for the appellant.

GARLAND, J. The plaintiff having obtained a judgment against Stewart, Morton & Co., and another against Williams and Kellar, had his executions levied on a foundry and its contents, in the *Faubourg St. Mary*, which, after the issuing and dissolution of various writs of injunction, was, with its implements, stock and furniture, sold by the Sheriff. The proceeds being in his hands, A. G. Blanchard presented his claim, alleging that he was the proprietor of the foundry, and had rented it to the defendants, and claimed \$1850, as being due for rent, with a privilege on the proceeds of the property sold, for that amount. He claims rent at the rate of \$100 per month from the 1st of September, 1840, to the 1st of August, 1841; and from the latter period to the 31st of December of the same year, at the rate of \$150 per month. It is admitted that the lot of Blanchard adjoins that of Kellar, which was sold; and that it has a front of sixty feet, and formed a part of the foundry. The office, and pattern shop were on it, and a number of patterns, with a variety of materials, tools, and other articles, which are specified in an inventory made and filed in the case. On the 1st of August, 1839, N. Benoist, acting as agent for some person whose name is not mentioned, rented to Stewart, Morton & Co. the foundry, known by the name of *St. Mary*, which is represented as being on a lot having sixty-four feet front on *Tchapitoulas street*, at the rate of \$100 per month, the lease to continue for two years, and the rent payable monthly, under a penalty of the lease being declared null, if more than two months rent is at any time in arrear. This lot is not shown to be the property of Blanchard; and the probability is, that it is not; as it is not of the same size with that admitted to be his. *Gothiel*, a witness introduced by Blanchard, says, that he was the owner of the foundry for some time in the year 1841. That

from the 1st of April to the 1st of August, 1841, he agreed to give Blanchard \$100 per month for his lots, and after the 1st of August, at the rate of \$150 per month. He says, that he had taken the lease of Stewart, Morton & Co., and that he retroceded the foundry to Benoist, in November of that year. He says, that he believes the sum of \$1100, claimed by Blanchard is due. From the testimony of the deputy sheriff, it appears that at the time of, and after the seizure by him, the articles on Blanchard's lot were kept separate from those on the other lot; and Powell, the plaintiff in the executions, was present at the sale, and requested the Sheriff to keep the articles on Blanchard's lot separate, as he might claim rent for it. It is further shown that Blanchard and Kellar were very intimate; that the former was frequently at the office, and in the foundry, and appeared, by his inquiries, and the interest he took, to be interested in it, and no one ever heard of his claiming any thing for rent until after the sale by the Sheriff. He was at the sale, and purchased some small articles, but never said any thing about his claim for rent, until afterwards, although the property on his lot was seized, and a keeper put in possession of it for some time previous the sale.

It is further shown that there has been a great deal of litigation in relation to this property, of all which, Blanchard was cognizant; yet, he never asserted his claim, although rent for seventeen months was owing, according to his account.

The Judge of the Commercial Court was of opinion that the claim was not founded in good faith; that it was very extraordinary that Blanchard never asserted it during all the litigation that was going on between Powell and Kellar, and Williams and Benoist and Gothiel his *locum tenens*, although he was the son-in-law of Benoist, and lived in the house with him. He therefore dismissed the claim with costs, and Blanchard has appealed.

The answer to the claim set up, in plain terms charges the claim to be simulated. It is alleged that Blanchard was a partner, or otherwise interested in the foundry. That if he was not, and had a claim for rent, he has lost his right to any privilege by his neglect to assert his claim, and permitting fifteen days to expire after the property went into the possession of other persons.

It is the duty of the intervening party to make out his case sa-

tisfactorily. He was notified by answer, that the want of good faith on his part was alleged, and it was his duty to make out a fair claim. The extraordinary delay in presenting the demand, is unaccounted for. There is but one witness who says that Blanchard was to be paid, and he proves but little more than half the time for which rent is charged. The Judge below had an opportunity of seeing all the witnesses, and of hearing them testify. He has thought the testimony suspicious, and insufficient to support the claim; and we cannot say, from an inspection of it, that he erred.

Judgment affirmed.

BENJAMIN STORY v. CHARLES A. LUZENBERG and Wife.

Where the damages awarded to the plaintiff, in an action instituted by him, against an attorney of defendants, they being cited in warranty, for the amount stipulated to be paid to plaintiff in an agreement signed by defendants and plaintiff, and lent by the latter to the attorney, and not returned, were only for the temporary conversion of the agreement, which was produced on the trial, the signatures torn off; the judgment will be no bar to an action against defendants to enforce the agreement itself.

APPEAL from the District Court of the First District, *Buchanan, J.* The plaintiff alleges in his petition: that in the year 1832, he purchased from Mary Luzenberg, then the wife of one Fort, now married to the defendant Charles A. Luzenberg, a lot of ground in the city of New Orleans, from a part of which he was subsequently evicted by a judgment of the Circuit Court of the United States, for the Ninth Circuit and Eastern District of Louisiana in a suit instituted against him by Edward Livingston. That having commenced an action against Mary Luzenberg, to obtain compensation for the property of which he had thus been evicted, a compromise or agreement was entered into between himself and Mary Luzenberg and her husband, for the purpose of adjusting amicably all the matters in dispute between them; by which it was stipulated that certain persons should be appointed to fix the proportional value of the part of the property recovered by Livingston; that the value thus ascertained, and one-half of

the rents which the petitioner was condemned to pay to Livingston, and one-half of all the legal costs paid by him, with interest at seven per cent a year from the time the suit was commenced to the date of the agreement, should be considered as the just amount of petitioner's claim ; and that Luzenberg and wife should confess judgment for that amount as due by them, *in solido*, to the petitioner, payable in fifteen equal annual instalments, with interest at seven per cent a year from the date of such judgment, until paid.

The petition further alleges : That the estimate was made according to the provisions of the agreement, by which it appeared that the loss sustained by the petitioner in the value of his land, was \$33,500 ; and that the half of the sums paid for rents and legal costs, amounted to \$22,424, making together \$55,924, with interest at seven per cent per annum from the 5th of June, 1839, till paid ; for which he is entitled to a judgment under the agreement, but with which agreement the defendants refuse to comply. The petitioner concludes with a prayer for the specific performance of the agreement, and for a judgment against the defendants, *in solido*, for \$55,924, with interest at seven per cent per annum from the 5th June, 1839, till paid.

The defendants answered separately, but the case was decided on an exception in which both united. It alleges, that the plaintiff, in an action instituted before the District Court of the First District, (No. 20,417,) against Lucius C. Duncan, obtained a judgment for the sum of \$5000, for the value of the instrument of writing, or agreement, described in his present petition, on the averment that Duncan had converted the same to his own use. That the jury assessed the value of the said writing at \$5000 ; that the judgment remains in full force, and has been paid on an execution issued by the plaintiff. That the defendants were made parties thereto, and a judgment for a like amount rendered against them, in favor of Duncan, which they also satisfied ; and that the judgment so rendered is a bar to the present suit, the matter being *res judicata*.

The record in the suit of *Story v. Duncan*, was introduced in evidence. The petitioner in that action claimed \$62,500 of the defendant, alleging that he was the owner and possessor of certain articles of agreement entered into between himself and Lu-

zenberg and wife, by which the latter stipulated to confess a judgment in his favor for \$62,500, being the amount of the purchase money he had paid to Mary Luzenberg, for the part of the property from which he had been evicted by Livingston, with the rents he had been compelled to refund, and the costs to which he had been subjected, &c ; that, at the request of the defendant Duncan, the agreement had been delivered to him by plaintiff's agent on his promise to return it ; and that, though amicably requested, he had failed to do so, having converted it to his own use. Duncan answered, after a general denial that he had acted as counsel for Luzenberg and wife ; that as such, he had frequent communication with plaintiff's attorney touching his claim against Luzenberg's wife ; that the *projet* of an agreement had been signed, in duplicate, by the plaintiff and Luzenberg and wife, the terms and stipulations of which, being minutely detailed, he did not accurately recollect ; that at the request of his clients he had called on the attorney of the plaintiff to procure a loan of the duplicate of the agreement belonging to the plaintiff, then in the hands of his attorney, the object of the respondent's clients being, as he was informed, to compare it with the duplicate in their possession, as they had discovered certain interlineations which they supposed affected their interest ; that plaintiff's attorney handed him the duplicate, which he delivered to his clients, and " that thereupon, after a full conference in reference to said *projet* of an agreement, and to the claim generally of the plaintiff against them, they discharged him (Duncan) from all further professional agency in the matter of the claim of the plaintiff against them, retaining in their possession all the papers in relation thereto, and, among them, the said *projet* of an agreement ;" that immediately after he called on plaintiff's attorney, and informed him, of the result of his conference with his clients ; that they were in possession of his duplicate of the agreement, and that they would through other counsel, confer with him on the subject ; that these facts were immediately communicated to the plaintiff by his attorney, and that, therefore, the charge that he is in possession of the said duplicate, or has any control over it, or has in any sense, converted the same to his own use, is false and defamatory, &c. The defendant further averred, that if the plaintiff has any claim against him, Luzenberg

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and wife are bound to warrant and defend him in the premises ; and he prayed that they might be made parties to the suit, and be ordered to produce in court the *projet* of agreement above mentioned.

Luzenberg and wife answered separately, denying so much of the petition of Story and of Duncan's answer, as is not expressly admitted to be true in their answer. They admitted that they had signed a paper such as that described in Duncan's answer. Charles A. Luzenberg further averred, that he had been informed by Duncan, his counsel, that the instrument was only a *projet*, or form of agreement, not binding as such ; that he signed the same through ignorance of his rights and in error of law, and that he was, consequently, not bound thereby ; that the agreement was, as to him without consideration, he being in no way liable for any debt of his wife contracted before marriage ; and that he never received the paper, or had any thing to do with it personally, but that he ratified and adopted the acts of his wife mentioned in her answer. Mary Luzenberg admitted that she had sold the property referred to in the plaintiff's petition, and that she had signed a paper in relation to his supposed claims growing out of the eviction by Livingston, which paper she was advised by her attorney, Duncan, was a *projet* of an agreement intended as the basis of a settlement to take place subsequently, between the plaintiff and herself and husband ; she alleged that as the *projet* had not been fully executed by the plaintiff, she believed she had a right to recede therefrom ; that she was not entirely satisfied with the professional opinion given by her attorney, Duncan ; that the paper was, at her own request, handed to her by Duncan ; that it was fairly obtained by her as her sole property, without any participation or knowledge on the part of her husband ; that Duncan had not possession of the paper for some time previously to the commencement of the suit ; and that he had not since had the possession of it. She denies Story's right to the paper, or that she has contracted any obligation towards him in consequence of its execution ; and offers to produce the paper on the trial, admitting that it was signed by Story, her husband and herself, and that she cut from it the two last signatures. Both herself and husband declare, in their answers, their readiness to submit to any legal liability re-

sulting from signing the said paper, and to answer to any suit which the plaintiff may institute thereon, and to produce the paper on the trial of any such suit.

The duplicate, from which the signatures had been cut, was produced on the trial, and it was admitted that it had been signed by Story, and Luzenberg and wife. Its contents are recited substantially in the plaintiff's petition. R. H. Chinn who had acted as the attorney of Story, testified, that Duncan applied to him to borrow the duplicate of the agreement, stating that his brother was absent, and their copy locked up. He could not undertake to repeat the expressions of the defendant ; but his impression was, that Duncan wished to obtain the copy in order to prepare the decree of court provided for in it. He handed the copy to him without hesitation. The next morning Duncan informed the witness that Luzenberg and wife were dissatisfied with him, and that he was no longer their counsel. Witness then asked for the return of the paper, and thinks that Duncan told him that he had left it with Luzenberg and wife, and that he would procure it and return it. At his next interview with Duncan, the latter informed him that Mr. Hennen was the counsel of Mrs. Luzenberg, and that he had the paper. Witness called on Hennen, who stated that he had never seen the paper. He afterwards called several times on Duncan, who repeatedly assured him that he would procure the paper. This witness stated further, that at the time the agreement was borrowed, nothing was said in relation to any discrepancy between the duplicate copies ; and that had any such suggestion been made, he would not have given up his copy, but would have required the other parties to bring theirs to him.

The record of the suit of Livingston against Story was offered in evidence by the plaintiff, on the trial of the suit against Duncan, and Luzenberg and wife, as intervenors ; and the testimony of Banks, one of the appraisers named in the agreement, was introduced to prove the value at which the appraisers estimated the property, from which the plaintiff had been evicted. Hennen, the attorney of the defendants Luzenberg, affirmed that he had never had the agreement in his possession, and never tendered it to Chinn. The case was submitted to a jury, and the judge, at the instance of the plaintiff's counsel, charged them :

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"That if they believed the evidence they would be authorized by law, to find a verdict against the defendant, to the extent of the liability of Mrs. Luzenberg to Mr. Story, under the contract mentioned in the plaintiff's petition." There was a verdict in favor of the plaintiff against Duncan for \$5000, and in favor of the latter for the same amount against Luzenberg and wife, and judgment accordingly. The judgment was signed on the 17 February, 1842. Both the defendants Duncan, and Luzenberg and wife, moved for new trials, which were refused. On the 26th of February, Charles A. Luzenberg prayed for a suspensive appeal, and executed a bond therefor. On the 3d of March the clerk was directed by Hennen, as the attorney of C. A. Luzenberg, not to issue citations of appeal, or to take any further steps until requested. *A fi. fa.* was issued against Duncan on the 7th of March, and on the 18th of April, returned satisfied. On the 9th of March, Duncan acknowledged on record, that he had received satisfaction of his judgment against Luzenberg and wife. Such is the substance of the record in the suit of Story against Duncan, No. 20,417, of the docket of the District Court of the First District.

The Judge of the District Court, before whom the present case was also tried, was of opinion that the exception *rei judicate* should prevail, and he dismissed the action. From this judgment, Story has taken this appeal.

Chinn and Grymes, for the appellant, cited 3 Modern Rep. 1. *Wheelock v. Wheelwright*, 5 Mass. 104. *Bond v. Ward*, 7 Ib. 134. *Murray v. Burling*, 10 Johnson, 172. 2 Ib. 380. 2 Starkie, 837, 838, ed. 1836.

Hennen, for the defendants. The petition in this suit was filed on the 15th of March, 1842, and prays for the specific execution of a certain agreement entered into by the plaintiff of the one part, and the defendants of the other. The defendants filed separate answers, and pleaded a former judgment and recovery on the same cause of action, under the following circumstances. On the 29th of June, 1841, the plaintiff in this suit commenced an action (No. 20,417,) against L. C. Duncan, in the District Court of the First Judicial District of the State of Louisiana, charging him with having converted to his own use, the articles of agreement upon which the present suit is founded, and claiming damages to the

value of the plaintiff's interest in the agreement ; to which suit, the defendants C. A. Luzenberg and wife were *made parties in warranty*. Judgment was rendered for \$5000 against Duncan, and for the like sum against the present defendants in favor of Duncan. *Satisfaction* of these judgments was acknowledged by the plaintiff and by Duncan. The defendants in this suit set forth these proceedings, and plead that they are a bar to any other action on the said agreement. The plea was sustained by the judgment of the court below, from which the plaintiff has appealed.

The defendants, in support of that decision, allege that the judgment and satisfaction in suit No. 20,417, effected a complete extinguishment of all the plaintiff's rights in said agreement, and that immediately upon the satisfaction of their judgment, the agreement by *operation of law*, became the property of the defendants, and this :

I. Because the suit No. 20,417, is in fact an action of *trover*, and subject to the rules by which that action is governed. The petition contains all the substantial allegations which constitute the declaration in *trover*. It charges that the plaintiff was in *possession* of the chattel, at the time of the conversion. This is a necessary averment in *trover*. See 1 Chitty's Pleadings, 150, and 15 Petersdorff's Abridgment, 201. It sets forth the *value* of the thing converted. It charges that the defendant unjustly detains the chattel after a *demand*, and that he has *converted the same to his own use*. 1 Chitty's Pleadings, 155. It asks for *damages* for the conversion, and does not pray for the restoration of the thing itself ; thereby assimilating it to the action of *trover* instead of *detinue*. The distinction between *trover* and *detinue* is, that the former is for the recovery of damages to the *value of the thing converted*, the latter for the recovery of *the thing itself*. See 1 Chitty's Pleadings, 148. 3 Wils. 336. Willes, 120 ; and the opinion of Lord Mansfield in 1 Burr. 31. See the form of declaration in *trover* in Stephens on Pleading, 48.

II. The petition is thus almost *technically* framed in *trover*. But the rule of the common law is settled and well defined, that the recovery and satisfaction of damages in the action of *trover*,

changes, by the act of law, the title of the property converted. The authorities on this point are uniform. In the language of Chancellor Kent, "on a recovery by law in an action of trespass or trover of the value of a specific chattel, of which the possession has been acquired by tort, the title of the goods is altered by the recovery and is transferred to the defendant, and the damages recovered are the price of the chattel so recovered by the operation of law." 2 Kent's Comm. p. 319, ed. 1827; 386, ed. 1840. And see 6 Johns. 168. 8 Cowen's Rep. 43. 2 Aik. Rep. 203. 2 Bailey's S. C. Rep. 466. 1 Hen. & Munf. 449. 1 Rawle, 121. 4 Rawle, 273. 1 Rice's S. C. Rep. 60. 3 Greenleaf, 250.

III. The property in the articles of agreement was thus transferred to the defendants from the plaintiff, and they are entitled to all the rights which were his by virtue of such agreement. This was tacitly admitted in the judgment of the court, with which the plaintiff was satisfied, when it transferred Story's right of action, incident to the property in the agreement, to Duncan, and when, the latter being thus made the owner of the agreement, it awarded judgment against the present defendants. On no other principle could Duncan have an action against the parties cited in warranty.

The defendants are equally, by the principles of the civil law, owners of the articles of agreement after satisfaction of damages.

The civil law declares the award of damages to be a sale of the thing to the defendant: *Si lis fuerit aestimata, similis est venditioni*. Dig. lib. 6 tit. 2. De Publiciana in rem actione, l. 7. Dig. lib. 42, tit. 4. l. 15. The Pandects are full of instances where this principle is applied. And this even in actions in rem, where the specific recovery of the thing, and not damages, was demanded by the plaintiff. Thus in the action of revendication, where damages were awarded by reason of the defendant's refusing, or putting it out of his power to return the chattel, the satisfaction of those damages conferred on the defendant an indefeasible title to the thing claimed. *Possessor qui litis aestimationem obtulit, pro emptore incipit possidere*. Dig. lib. 41. tit. 4. l. 1. And in the action "*commodati*," the same rule prevailed; the acceptance of the damages by the plaintiff, transferred the property. *Si quis hac actione egerit et oblatam litis aestimati-*

onem acceperit, rem offerentis facit. Dig. lib. 13, tit. 6, l. 5, § 1, et in notis Gothofredi. And see the case put in the Gloss ad Dig. lib. 6, tit. 1, l. 46, *verb.* ejus rei.

But the application of this rule is more particularly interesting in the action "*rerum amotarum*," an action for damages, and which resembles the suit No. 20.417 in many more important features. There, the party, against whom damages were awarded, was held to become the *owner* of the property, even though his or her possession in the first instance, had been acquired by *fraud*. And this rule was applied to the extent, that if the plaintiff became subsequently possessed of the property, he was liable to an action for its recovery by the former defendant. And the same general rule is urged in support of the doctrine, viz. that by payment of damages, the chattel had been transferred to the defendant: *Qui litis æstimationem suffert, emptoris loco habendus est.* Dig. lib. 25, tit. 2, l. 22. And further in the case of *depositum* or *commodatum*: *In depositi vel commodati judicio, quanquam dolo adversarii res absit, condemnato succurri solet, ut ei actionibus suis dominus cedat.* Dig. lib. 42, tit. 1, l. 12.

This doctrine has received the sanction of modern writers of high eminence.

Voet in his commentary on the Pandects, observes that "the party converting property to his own use becomes, after satisfying the damages, the proprietor of the thing converted, and has his action for the possession against third parties." *Ea vero æstimatione præstita, amovens quidem emptoris loco est, domini-umque nanciscitur, si is cui æstimatio soluta dominus fuerit, sic ut ob id etiam adversus tertios possessores habeat in rem actionem.*" Voet, Com. in Pand. ad lib. 25, tit. 2, l. 22, vol. 2. p. 115.

The learned Cujas is even more pointed on the same subject. "*Sed sunt quatuor vel quinque casus quibus Publiciana datur adversus dominum; nec obstat agentì exceptio dominii. Unus est in hac lege, cujus ratio est elegans et evidens: nam si non esset efficax actio Publiciana adversus dominum, dominus haberet et rem et æstimationem. Quod est iniquum. Imo vere ut idem Papinianus in fine demonstrat, non auditur dominus cum quo agitur Publiciana, si velit, ne rem restituat omnia retro agere et retractare, id est, si paratum se esse dicat pretium et litis æstimationem res-*"

tituere, se malle rem quam pretium, pretium redditurum, modo sibi res non auferatur Publiciana : non audietur, quia in potestate venditoris non est recedere a venditione, quæ perfecta est invito emptore : litis æstimatio venditio est. Emptor est qui solvit pretium rei, etiamsi dominus non fecerit pretium rei, sed iudex : sunt necessariae quædam venditiones. Ergo is qui litis æstimationem pertulit, actione Publiciana, invito domino, rem auferet." Cujas Com. in lib. 12, Quæst. Æmil. Pap. ad leg. 63. vol. 4, p. 289, C. Oper.

Merlin affirms the same principle in the article "Du Prêt" in the Répertoire. "*Par le moyen d'un tel paiement, l'emprunteur demeure subrogé aux actions du prêteur pour revendiquer la chose, contre ceux qui peuvent l'avoir entre leurs mains.* Merlin, Répertoire, vol. 13, p. 34, verbo "Prêt."

The opinion of Pothier coincides with these authorities. "*Lorsque le possesseur qui, par sa faute, s'est mis hors d'état de restituer la chose revendiquée, paie au propriétaire la somme à laquelle ont été réglés les dommages et intérêts, le propriétaire est censé lui abandonner tout le droit qu'il a dans cette chose. C'est pourquoi cet ancien possesseur, qui a payé, peut, comme étant aux droits du propriétaire à qui il a payé cette somme, exercer à son profit et à ses risques, contre les tiers qui se trouveraient en possession de cette chose, l'action de revendication que le propriétaire eût pu exercer ; et si le propriétaire qui a reçu la somme s'en trouvait depuis lui-même en possession, l'ancien possesseur qui lui a payé cette somme, serait bien fondé à intenter contre lui la demande, pour la lui faire délaisser.*" He cites the Digest to the effect. Pothier, Propriété. No. 364.

Nor would the rule of the civil law permit the original proprietor, who had repossessed himself of the chattel, after payment of damages, to retain it on the ground that the damages were inadequate, and that he preferred to keep the property and return the sum paid. Such payment had made an absolute transfer, and under no circumstances could the former proprietor be permitted to continue as owner, when thus divested. The opinion of Cujas cited above is expressed upon this point, which is confirmed by Pothier. The latter author in the place just above quoted says : "*Le propriétaire ne serait pas même reçu en ce cas de ren-*

dre la somme qu'il a reçue, pour se dispenser de rendre la chose à celui de qui il a reçu la somme. Nec facile audiendus erit, ajoute de suite Papinien, si velit pecuniam quam ex sententia judicis periculo judicati recepit, restituere." Dig. lib. l. 63. tit. de rei vind.

This principle is again referred to and enforced by the same author in his treatise, *Des contrats de Bienfaisance*. *L'emprunteur ayant payé au prêteur le prix de la chose prêtée, est subrogé aux actions de prêteur pour la revendiquer contre qui il en trouvera en possession : et en se la faisant délaisser, il en acquiert la propriété.* Pothier, *Contrat de Bienfaisance*, No 68.

Thus by the civil as well as the common law, the defendant, on satisfying the damages, becomes the proprietor of the thing converted. The defendants in warranty in the suit No. 20,417, having paid the value of the agreement, as it was assessed by the jury, became by such payment the owners of the agreement, and the plaintiff, having accepted the price which the judgment of the court placed upon it, is barred by such acceptance from seeking a second payment of its value.

But if the suit No. 20,417 be considered simply as to the internal evidence it offers, the court will feel itself bound to apply the rule, that the damages were the price of the chattels, and transferred the property.

1. The petition is for the recovery of *damages*, and not for the *thing*. The plaintiff *abandoned* his right of property to the tortious converter, and sought remuneration only in the award of damages by the court. The *supposed* value of the agreement was set out in the petition, and it was this supposed value which the plaintiff claimed as the *measure* of his damages. So that the question was distinctly presented to the jury, "what is the true value of the agreement to the plaintiff?" But having thus *waived* the recovery of the specific chattel, and contented himself with being *paid* for it by the action in trover, will he now be permitted to assert the rights which he himself has rejected?

2. The plaintiff having sued for the *value* of the agreement, offered evidence upon the trial on this point. It was upon this evidence that the verdict and judgment were founded: and, if the plaintiff is now dissatisfied with that judgment, he must attribute

it to the proper cause, to wit, the loose and improper character of the evidence he introduced. The agreement contained *mutual* stipulations. It acknowledged, at least, on the part of the plaintiff, that certain sums had been paid which were to be deducted from the amount found due. The plaintiff did not show that he had performed, or was ready to perform his part of the agreement, which *alone* would entitle him to bind the defendants. The proof also of the arbitration and award was entirely deficient. The arbitration was by *two* persons, and the plaintiff produced but one on the trial. Nor did he show that *joint* notice had been given to the Luzenbergs, or to their agent, of the award. No evidence was offered to show what amounts the plaintiff paid the heirs of Livingston, which formed one of the items stipulated in the agreement to be paid. But the principal evidence introduced was relative to the amount of costs paid by the plaintiff, and which was allowed him by the jury. The jury was further expressly charged by the direction of the plaintiff, that if they believed the plaintiff's witnesses, they were bound to return a verdict in damages, *equal to the value* of the plaintiff's interest in the agreement. Upon this charge the verdict for \$5000 was rendered. The plaintiff was satisfied with the verdict, and did not, as he might have done, had it been against law or evidence, seek to disturb it. He *acknowledged satisfaction* upon it. Did he not thereby admit that the damages returned were the *true value* of his interest? Had he not the means, had it been otherwise, to correct the error of the jury upon a new trial? And having assented to the justice, and acknowledged satisfaction of the judgment, can he ask of this court to review that case, and make up to him the supposed deficiency?

The condition of the plaintiff has been anticipated by the civil law. It has been seen that he would not have been permitted to retain the property, under the sense of the *paucity* of the damages. It was not *his own idea* of his interests, which would always be excessive, which determined the amount the defendants had to pay, but it was the judgment of the court. It was, in the words of Pothier, "*la somme à laquelle ont été réglés les dommages et intérêts*," that the defendant had to satisfy as its value. And the

expression of Papinian, cited in the Digest is the same. *Pecuni-
am, quam ex sententia judicis periculo judicati, recepit.*

Even if the court were convinced that full justice had not been done to the plaintiff in the former suit, it would be bound to apply that salutary principle of the civil law to this case: "*Rei judicatae natura est, ut sit immutabilis, etiamsi male judicatum sit.*" But it is clear, that this case comes within the equitable principle cited in *notis Gothofredi* on the action "*depositi*," in the Digest. "*Æquitas hæc rationem habet ut scil. qui deposuit, teneatur ei cedere actiones, quia est iniquum ut res suas a depositario recuperet, et pretium rei simul accipiat.* Dig. lib. 42, tit. 1, ad leg. 12, in *notis*, Goth. No. 2.

MORPHY, J. On the tenth of March, 1832, the widow Fort, now the wife of Charles A. Luzenberg, sold to Benjamin Story an undivided moiety of a parcel of ground, for the sum of fifty thousand dollars payable in five years, and bearing interest at the rate of seven per cent per annum. The purchaser having been evicted of a part of the premises, under a judgment of the United States Circuit Court for the Eastern District of Louisiana, rendered in a suit brought against him by the late Edward Livingston, instituted an action against his vendor, Mary Luzenberg, in 1839, to be compensated for the loss of the property, the rents, costs, &c. Pending this suit, an agreement in writing was entered into between, and was signed by, Benjamin Story and the said Charles A. Luzenberg and his wife, for the purpose of making an amicable adjustment of all Story's claims for and on account of the property bought, and lost by eviction. Among other stipulations it was agreed, that Thomas Banks and Peter Laidlaw should be appointed to fix the relative value of the portion of the property recovered by the heirs of Livingston; that the value thus fixed, together with one moiety of all the rents and costs paid by Story, with interest at the rate of seven per cent per annum from the date of the eviction to that of the agreement, should constitute the measure of the purchaser's claim; and that when their indebtedness should be thus ascertained, the said Charles A. Luzenberg and his wife, should confess a judgment for the amount thereof in favor of Story, payable in fifteen equal and annual instalments, bearing an interest of seven per cent per annum from

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the rendition of the judgment until paid. A short time after, the defendant's counsel, Lucius C. Duncan, Esq., called upon the counsel of Story, and asked of him to hand him his duplicate of the articles of agreement entered into between their clients, stating that his copy of the same could not be procured at that time. The paper was handed to Lucius C. Duncan. On the next morning he informed Story's counsel that Luzenberg and his wife had become dissatisfied with him, and that he was no longer their attorney; that he had left the agreement with them, but that he would get it back and return it to him; this not having been done, after repeated demands, a suit was brought against Duncan, claiming of him damages to the extent of \$62,500, on the ground that he had converted the agreement to his own use, and refused to return it according to his promise and undertaking. Duncan, after various matters of defence, stated that Luzenberg and wife, when they employed other counsel in their suit against Story, retained in their possession all the papers belonging to the case, and, among them, the articles of agreement that he had handed to them at their request. He prayed that they might be cited to defend him in the suit, and to produce the agreement so delivered to them, and that he be held harmless. Luzenberg and wife filed separate answers pleading various matters, but both acknowledging that they had signed the articles of agreement, which they say were represented to them, by their counsel, as a mere project of an agreement, not binding on them. They both aver their readiness to answer to any suit, which Story may think proper to institute against them in relation thereto, and their willingness to produce on the trial the duplicate, from which it is admitted that their signatures had been cut off by Mrs. Luzenberg. There was a verdict and judgment in that suit for \$5000 in favor of Story against Duncan, and one for the same sum in favor of Duncan against his warrantors Luzenberg and wife, which judgments were satisfied. The present action is now brought to obtain the specific execution of the agreement, the material parts of which have already been stated. The petition alleges that Thomas Banks and Peter Laidlaw have made the estimate therein contemplated, from which it appears that plaintiff's loss on the land purchased for the portion of which he has been evicted, is \$33,500, and that the

moiety of the sum he has paid to the heirs of Livingston for the rents and the costs, amounts to \$22,424, forming the aggregate amount of \$55,924, for which judgment is prayed in *solido*, against the defendants, with interest at seven per cent per annum from the 5th of June, 1839. To this demand a peremptory exception was filed, setting up as a bar to it the judgment in the suit against Duncan, to which the defendants were made parties, and in which the plaintiff obtained the sum of five thousand dollars as the value of the instrument of writing or agreement described in his petition, and alleged to have been converted by the said Duncan to his own use. From a decision of the Judge below sustaining this exception, the plaintiff prosecutes the present appeal.

A number of highly respectable authorities have been quoted by the appellees' counsel, in support of the well known rule, that on a recovery, in an action of trespass or trover, of the value of a specific chattel, the title to it is altered by the recovery, and is transferred to the defendant by operation of law. The maxim, *solutio pretii emptionis loco habetur*, belongs, it is believed, to almost every system of jurisprudence, being founded in justice and in reason, which are the bases of all laws. As far back as the year 1818 this court held, in *Jourdan v. Patton*, that if, for an injury done to her slave, the plaintiff recovers his full price or value, the property is transferred to the defendant on payment of the judgment. 5 Mart. 617. The principles relied on by the appellees being then incontrovertible, the question in this case appears to us to be entirely one of fact: Did the jury assess and award to the plaintiff in the suit pleaded in bar, the value of the agreement alleged to have been converted by Duncan? From the pleadings, the evidence in the record, and all the attending circumstances, we believe that they did not, and that the damages of \$5000 were allowed, not for the value of the instrument of writing, or of the claims which could be enforced under it, but for its temporary conversion. It is true that the Judge, in his charge, instructed them, that they were authorized by law to find a verdict against the defendants to the extent of Mrs. Luzenberg's liability to Story under the contract. This, they properly refrained from doing, the paper having been surrendered on the trial al-

though in a state of mutilation, and the warrantors having averred their readiness to litigate their rights with the plaintiff, in relation thereto, in any suit he might think proper to institute against them. These averments were evidently intended by the defendants to mitigate the damages against Duncan, who had called them in warranty, as being in possession of, and refusing to surrender the agreement, and they produced the desired effect. But for these averments, and the production of the contract upon which the present action is brought, the jury might, and probably would have given a verdict for the whole amount of the defendants' liability to Story, which they would have had to discharge without having the benefit of the long terms of payment, and the other facilities secured to them by the agreement. These averments may be viewed in the light of, and must have the effect of a reservation, securing to the plaintiff the right which he would not perhaps otherwise have had, of urging his claims against the defendants, under the agreement, in a subsequent suit. It is clear that it was so understood by the jury when they awarded an amount of damages, which no one at that time supposed to be an assessment of the value of the agreement, or of the claims of the plaintiff under it. The warrantors struggled to obtain a new trial, and failing in that attempt, they took a suspensive appeal. It is true that this appeal was afterwards abandoned, and the judgment satisfied; but not, perhaps, until it had occurred to them that, by the payment of its amount, they might possibly succeed in setting it up as a bar to any further claim on the part of the plaintiff. It has been held that in an action of trover for a permanent conversion, it is competent to the plaintiff to show that the damages were given merely for the temporary conversion, and not as the value of the chattel. 3 Starkie, p. 1508 and note (z) ed. of 1828. In the present instance we are satisfied, from all the circumstances of the case, that the damages awarded were only for the temporary conversion of the contract or agreement, and that, after having made averments tending thus to mitigate the damages, and reserving, in some manner the plaintiff's right to bring the present suit, the defendants should not be permitted to set up a plea inconsistent with such averments, and thus evade a fair investigation of plaintiff's claims against them.

Tait v. Lewis, executor.

It is therefore ordered that the judgment of the District Court be reversed ; that the exception set up by the defendants be overruled ; and that this case be remanded for further proceedings. The appellees to pay the costs of this appeal.

BACON TAIT v. JOHN L. LEWIS, Executor.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

G. Strawbridge, for the appellant.

Roselius, for the defendant.

SIMON, J. The present case was before us, last year, upon certain exceptions which were overruled, and it was remanded with directions to the defendant to answer to the merits. 2 Robinson, 351. The mandate of this court was filed in the court below, and, it having been subsequently shown, that the defendant had not complied with our directions by filing his answer, a judgment by default was moved for, and entered against him.

On the motion made by the plaintiff's counsel for the confirmation of the judgment by default previously taken, he attempted to establish his demand by certain written evidence which was deemed insufficient by the court *a qua*, whereupon a judgment of nonsuit was rendered against him, which we are called upon to reverse.

A motion has been made by the appellee for a dismissal of the appeal, on the ground, that the appellant has never applied to the court below for an appeal from the judgment rendered in this suit ; and that the appeal is prayed for, and granted in a different case from that brought up in the present record.

On referring to the petition of appeal, it is therein stated : " that there is error in the judgment rendered in the matter of the opposition of Bacon Tait, to the account of James Lewis, Executor, whereby he is aggrieved and prays that an appeal be allowed, &c.

The present suit is one in the ordinary form, by petition and citation, founded on a judgment formerly rendered in Virginia against

 Leeds and another v. Debuys.

the administrator of De Eude's estate, wherein the plaintiff prays that the executors of the deceased may be condemned to pay the amount of the judgment above stated, by preference, out of the proceeds of certain partnership funds. We have looked in vain in the record, for an account rendered by the defendant Lewis, to which opposition may have been made by the plaintiff; and from the pleadings in the case, and the proceedings had on the trial, it does not appear to us that any account filed by Lewis as executor, was ever made the subject matter of this controversy. Indeed, it is clear that the present suit is, so far, unconnected with any account filed or to be filed by the defendant, and that the petition of appeal brought up with the record, does not relate to the matter decided upon by the court below. If so, this case is not before us; as it does not appear that any appeal was ever taken from the judgment submitted to our consideration; and from the circumstance of the plaintiff's counsel arguing his case upon the merits, notwithstanding the motion to dismiss, without applying to this court for the issuing of a writ of *certiorari*, we are induced to believe that no petition of appeal from the judgment brought up was ever presented to the lower court, upon which the action of the inferior judge was ever required and obtained. The motion to dismiss must be sustained.

Appeal dismissed.

JEDEDIAH LEEDS and another v. WILLIAM DEBUYS.

An exception that the petition and citation were not drawn or served in the French language, the maternal tongue of the defendant, must be pleaded *in limine litis*, or it will be considered as waived. It will be too late after a judgment by default has been confirmed, though the judgment of confirmation has not been signed. Where a judgment by default has been obtained on a claim exceeding five hundred dollars, it may be confirmed on the testimony of a single witness, the fact of the debt not being denied being a corroborating circumstance. The possession of the note sued on, may be also viewed as a corroborating circumstance.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

Bradford, for the plaintiffs.

Mazureau, for the appellant.

MARTIN, J. The defendant is appellant from a judgment by default, afterwards made final. He complains that the first Judge erred in overruling his motion to have all the proceedings set aside, on the affidavit of his attorney, that he is a native of New Orleans, born from French parents, and that he speaks the French language as his native tongue ; the petition, the copy thereof, and the citation having been drawn and served in the English language only. The setting aside of the proceedings was claimed under the Code of Practice, arts. 172, 178, 179. The first Judge was of opinion that the right, is one of those which, like domicil alienage, official exemption, &c., must be urged in *limine litis*, or will be considered as waived.

The judge did not err. Before a court permits a Judgment by default to be made final, it must be satisfied that the defendant has been duly cited ; but it suffices that it appears that he was so by the inspection of the citation and return. If there be any circumstance which can lead the court to a different conclusion, the party who has an interest to avail himself of it, must place it on the record in due time. If he neglects to do so, he must bear the consequence. *Unicuique sua mora nocet.*

On the merits, the debt was fully proved by one witness. It is true it is for more than \$500 ; and we believe that the absence of a denial of the debt is a circumstance which corroborates the testimony. To this may be added the possession of the note by the plaintiffs. 7 La. 181.

Judgment affirmed.

CORNELIUS J. MEEKER v. SAMUEL GALPIN and another.

Suspensive appeal, but no statements of facts, though the evidence was not reduced to writing, and appeal dismissed for insufficiency of the security. A devolutive appeal having been taken after the lapse of the time for a suspensive appeal, a statement of facts was made out by the court according to law. On a motion to dismiss on the ground that the statement was made too late: *Held*, that the statement was made in time, and that such statement may be made at any time after judgment signed, provided it be before the appeal, (C. P. 602,) which might have been taken at any time within a year, from the date of the judgment.

After a suspensive appeal, and execution issued on account of the insufficiency of the security, a devolutive appeal may be obtained, after the ten days have elapsed, without any order formally setting aside the former, which becomes inoperative by the mere failure of the party to comply with the terms on which it was granted.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Benjamin*, for the plaintiff.

Emerson, for the appellants. A statement of facts made out before the appeal, but ten months after judgment, is in season. *Union Bank v. Williams et al.* 16 La. 237.

There is no proof on record of Galpin's bankruptcy, or of his being in failing circumstances. His declining to pay the first draft is no proof of the fact, and he justly refused or neglected to pay the others, as the plaintiff had withdrawn, by sequestration, the very funds on which Galpin's acceptances were based.

But suppose he were in insolvent circumstances. A merchant who is in failing circumstances, and even under protest, may still sell and dispose of his property to a *bona fide* purchaser. *Syndic of McManus v. Jewett*, 6 La. 538. Same case, 9 La. 171. *Thompson v. Gordon*, 12 La. 260, 263, 264.

The sale was *bona fide* for a good consideration; for the defendant Morehead assumed part of Galpin's debts, and does not appear, to have been a creditor, nor does the plaintiff appear to have been injured by the sale. For aught in the record, Galpin was at the institution of the suit, and now is, abundantly able and ready to satisfy all just claims against him.

Fraud is never presumed except in cases of bankruptcy. It

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must be proved both in the vendor and vendee, with the addition that the alienation has produced an injury to the creditors. *Baudin v. Roliff*, 1 Mart. N. S. 165, 176, 177.

Creditors cannot attack the acts of their debtors unless they are injured by them. Hence they must show that sufficient does not remain to pay their claims. *Semple v. Fletcher*, 3 Mart. N. S. 386. Civil Code, arts. 1973; 1974.

A sale from a father to his son, who assumed part of his father's debts, is good; even if made to defraud creditors, and though the vendor was insolvent at the time of the sale. *Maurin & Co. v. Ronquet et al.* 19 La. 594.

A sale by a debtor on the eve of insolvency, of moveable property, will not be deemed in fraud of creditors, when it appears by the evidence to have been made for cash. *Wright v. His Creditors*, 12 La. 308.

Persons who are not creditors of an insolvent, may purchase and receive transfers of his property after he is in failing circumstances, and when they appear to be purchasers for a valuable consideration and in good faith, creditors cannot complain. *Dwight and Hartman v. Bemiss et al.* 16 La. 150.

MORPHY J. This action is brought on four bills of exchange accepted by the defendant Samuel Galpin, in favor of plaintiff, amounting to \$1225 84, and on an open account for \$423 79. It is alleged that those bills were given in payment of the price of fifty-seven kegs of butter sold to Samuel Galpin, yet in the store and possession of the debtor, and subject to the vendor's privilege, to which the petitioner is entitled as the holder of said drafts. It is further alleged that Galpin has become insolvent and unable to meet his engagements; that in order to deprive his creditors of their just claims he has made, within the last eight days, a collusive, fraudulent, and simulated sale to W. G. Morehead of all his property and effects, consisting of the stock in trade of the store occupied by him; that Morehead was the clerk of Galpin, and without any means to purchase; that the sole object and intention of the sale was to cover the property, and put it beyond the reach of his creditors, until it could be converted into cash; that part of the stock so conveyed was the merchandize on which the the plaintiff has a privilege; that Galpin possesses no property

whatever except that thus fraudulently assigned ; and that the petitioner fears, that during the pendency of the suit, the defendants will dispose of the goods, unless they be sequestered. The petition concludes with a prayer for a sequestration, for judgment against Galpin, and for the rescission of the sale of his stock in trade to Morehead, &c. The defendants filed separate answers pleading the general issue, denying the fraud and collusion charged in the petition, and averring that the sale from Galpin to Morehead was a *bona fide* transaction, in which a valuable consideration had been given by the purchaser, &c. There was a judgment below for the amount claimed, and for the rescission of the sale. The defendants have appealed.

A motion to dismiss this appeal was made on the ground that there was no statement of facts ; the one appearing on the record having been made too late, and contrary to law. The record shows that a suspensive appeal was first taken without any statement of the evidence having been made, but that, on a motion to that effect, the judge ordered an execution to issue, notwithstanding the appeal, on the ground that the security furnished by the appellants was insufficient. A few weeks after, other counsel employed by defendants with a view to a devolutive appeal, applied to the plaintiff's counsel to join him in making out a statement of facts. On the refusal of the latter to do so, the counsel made out one from information derived from the witnesses sworn on the trial, and submitted it to the judge, who adopted it with some slight corrections. A devolutive appeal was then prayed for and granted.

The Code of Practice has fixed no time for making out a statement of facts ; but from the words of article 602 it is clear that it must be at least before an appeal is taken, for it is to be procured, says that article, by the party *intending* to appeal. This court has, therefore, held, that a statement of facts can be made at any time after the judgment is signed, provided it be before the appeal. 8 Mart. N. S. 303. 16 La. 138, 237. It is urged that in this case it was too late to make a statement of facts, after the first appeal was granted, and that the second appeal was improperly allowed, the first not having been set aside. It is true that the first order was not formally set aside, but it became inoperative from the failure of the defendants to comply with its terms, and

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no appeal could have been brought up under it. 2 La. 86. After the ten days and during one year from the date of the judgment, the defendants were entitled to a devolutive appeal, to obtain which it was necessary for the judge to give an order fixing the amount sufficient to cover costs, and accepting good and sufficient security. To make good this appeal, we think the defendants were yet in time to make out a statement of facts.

On the merits, we assent to the conclusion to which the judge below arrived. The sale from Galpin to Morehead, his clerk, although apparently for a valuable consideration, appears to us also to have been a simulated one. No attempt has been made to show from what source Morehead derived the means of purchasing the stock in trade of his employer, from whom he had been receiving, up to the time of the sale, a salary of about \$35 per month; and after the sale Galpin remained in possession of the store, acting apparently as the clerk of his former clerk. As to the insolvency of Galpin, the allegation that he possessed no property whatever, except that conveyed to his clerk, has not been disproved. This sufficiently shows that the petitioner would have been injured by the sale. Civil Code, arts. 1966, 1980.

Judgment affirmed.

JOHN BAYARD and others v. THE GIRARD BANK OF PHILADELPHIA.

APPEAL from the Commercial Court of New Orleans, *Watts, J. T. Slidell and Rawle*, for the plaintiffs.

Halsey, for the appellants.

GARLAND, J. The plaintiffs allege that one Charles McAllister of Philadelphia, drew a draft on them at thirty days sight, for \$7,300, in favor of the defendants, which was accepted for the accommodation of the drawer, and that a consignment of Texas notes was made by McAllister to the plaintiffs, to meet the draft. It is further alleged, that the Girard Bank, in the event of the said Texas notes not realizing enough to cover the draft, agreed to guaranty the plaintiffs against the payment of the same, or in-

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demnify them in case of payment. The defendants deny that there was any such guarantee, or *assumpsit*. It is further stated that the draft was taken from McAllister, in payment of a debt he owed the Bank, for his accommodation, and that the Bank is in no manner liable for the amount.

The evidence shows, that Nicholas Biddle had obtained a loan from the Girard Bank, on the pledge or deposit of certain railroad stock, the proceeds of which, not being sufficient to pay the debt, Texas notes to a large amount were deposited as a security for the balance. McAllister was the broker, or agent of Biddle in managing this business, and he gave his checks for the money, and was charged with them on the books of the Bank. He was credited with the amount realized by the sale of the railroad stock; and for the purpose of paying the balance, he, with the assent of Biddle and the Bank, withdrew the Texas notes, which were pledged, and forwarded them to the plaintiffs to be sold, and on the faith of them drew the bill in question, which was accepted and paid. McAllister in his testimony says positively, that it was understood and agreed on at the time the draft was drawn, that the defendants should provide the means of paying it, in case the Texas notes should not sell for enough to meet it. Lewis, the Cashier of the Bank, says that there was no such agreement or understanding. It is also shown, that, at the time the draft was drawn and sent to the Bank, a memorandum was sent with it, stating that the Bank was to provide for the draft, in the event of the Texas notes not being sufficient to meet it, which the President and Cashier refused to sign. When the plaintiffs accepted the draft they had no information from McAllister or the defendants, that the latter would be in any manner responsible to them for it. They accepted on the faith of the Texas notes and McAllister's responsibility, and for his accommodation, as is specially alleged. After they informed McAllister of the improbability of selling the Texas notes, he then informed them of the guarantee by the Bank, and told them to draw on him, or Biddle, or Lewis, the Cashier of the Bank, to raise the money they had paid. They drew on McAllister himself, who failed to pay, and the amount is now claimed from the Bank on the alleged guarantee.

The court below gave judgment for the plaintiffs, and the defendants have appealed.

This judgment is attempted to be sustained on two grounds, first, of the alleged guarantee, and secondly, of the money having been paid and expended by the plaintiffs for the use of the defendants.

Upon the first ground, we have to remark ;—that there is but one witness on the part of the plaintiffs to prove any guarantee of the draft, that is, McAllister the drawer, and his testimony is contradicted by Lewis, the Cashier of the Bank. The plaintiffs when they accepted did not do so on the faith of a guarantee. They were not at the time told, that if the Texas funds should prove insufficient, the Bank would protect them. They state that they accepted the draft for McAllister's accommodation, who was their correspondent in Philadelphia. But it is the duty of the plaintiffs to make out their case ; and it is now well settled, that when the facts are doubtful, judgment must be given against the party holding the affirmative of the issue. 2 Mart. N. S. 494. The attempt to prove a guarantee of the draft by the defendants is sustained by but one witness, without any corroborating circumstances ; and his testimony is contradicted by another witness, who we must suppose equally credible.

The second ground, on which the judgment is sought to be maintained, is not, in our opinion, more tenable than the first. There is no proof that the plaintiffs paid the draft to accommodate the defendants. On the contrary, they allege that they accepted it for the accommodation of the drawer, who appears on the books of the Bank to be a debtor to the amount of it, though the evidence shows that he was only nominally so. Biddle was the real debtor ; but this is not material, as a debt was really owing to the Bank, and the draft was given for the purpose of paying it. The defendants used no improper means to induce the plaintiffs to pay this draft ; and we see no such equity existing in their behalf, as to induce us to compel a refunding of money, paid for the accommodation of a correspondent and friend. The counsel for the plaintiffs have urged that McAllister was the agent and broker of the Bank, as well as of Biddle, and that all parties are bound by his acts. We do not think the evidence establishes that fact. He

Endicott v. Scott.

was the agent of Biddle only, employed to transact his business with the Bank, and if he (McAllister) thought proper to put his own name forward to screen his principal, it was his own affair, and can have no weight in a contest between the plaintiffs and the defendants. If there is to be a loss sustained by one or the other party to this suit, we are of opinion that it should fall on the party who accepted for the accommodation of his correspondent, and who did not expect at the time that he did so, to hold the defendants in any manner liable.

The judgment of the Commercial Court is therefore reversed, and ours is for the defendants, with costs in both courts.

THOMAS W. ENDICOTT v. WILLIAM S. SCOTT.

Action on a draft in favor of plaintiff, drawn by defendant on a person with whom he was connected as a partner in planting. This partner being much in debt, has conveyed to the intervenor, by a deed of trust, executed in another state, his entire interest in the plantation and slaves, for the purpose of applying the crops to the payment of his debts. The intervenor was in possession under the deed, with the knowledge of defendant, though the latter was not a party to the instrument. Plaintiff having attached a part of the crop made by the intervenor on the plantation: *Held*, that the latter cannot be deprived by the creditors of either partner, of any part of the crop, until all the expenses of his management of the plantation have been reimbursed, and that the plaintiff could attach in the hands of the intervenor, only the balance due to defendant on a settlement of accounts.

APPEAL from the District Court of the First District, *Buchanan, J.*

Chinn, for the plaintiff.

Grymes, for the intervenor and appellant.

MARTIN, J. William F. Smith, intervened in this case to claim the cotton attached, and is appellant from a judgment against him. The defendant and one Cox were concerned in planting in the State of Mississippi, and were, as such, indebted to the plaintiff. Scott gave Endicott a draft on Cox for the debt, on which the present suit was brought. Cox being largely indebted to several banks, and other creditors in the State of Mississippi, on the 27th

of April, 1840, made a deed of trust to the intervening party and appellant, of the plantation and slaves, for the purpose of the latter's receiving the crops, as far as Cox was interested therein, to wit, three-fourths thereof, and of applying the same to the discharge of Cox's debts aforesaid, until thereby, or by other means, they should be satisfied. In pursuance of this arrangement, the intervening party took possession of the plantation and slaves, and the cotton he claims was raised on the plantation, and shipped by him to New Orleans, where it was attached by the plaintiffs, as the property of the defendant. Cox is now dead, and his representative is not a party to the present suit. It appears to us that the first judge erred. The cotton was in the possession of the appellant, under a deed of trust from Cox, to which the defendant, it is true, was not a party; but certainly with the defendant's knowledge, as it is in evidence that he overdrew, or had under his control, more than his proportion of the crop of 1841, and in consequence of his promise to the appellant to refund to him this overplus, the latter has, since the present attachment was levied, delivered to him thirty bales of cotton. The appellant being, under the deed of trust of one of the parties, interested in the plantation, and, with the knowledge of the other, in possession of it, the slaves, cattle, &c., cannot be deprived by the creditors of either, of any part of the crop raised, until all the expenses attending his management of the plantation are reimbursed; and all that the plaintiff could have attached, in the appellant's hands, was any balance due by the appellant to the defendant on a settlement of accounts.

The judgment of the District Court is therefore annulled and reversed, and ours is in favor of the intervenor, sustaining his demand for the cotton attached, or its proceeds as set forth in the pleadings, with costs in both courts.

JOHN B. D. VOISIN v. AIMÉ GUILLET.

The act of 12th March, 1838, creating the office of Collector of State taxes on landed property, slaves, and vehicles for the parish of Orleans, contemplates and provides that a collector of State taxes for that parish shall be appointed every year, for the special purpose of collecting the taxes due on the assessment roll, made for and during the year of his appointment, without any reference to the collection of the balance of the taxes remaining due for the preceding year. The bond required relates exclusively to the assessment made during the year of the appointment. And under the act of 28th February, 1840, amending that of 12th March, 1838, though another person may have been appointed collector for the next year, the collector of the preceding year is authorized, and bound to retain the assessment roll and receipts for taxes uncollected at the end of his year, and to proceed with the collection of such taxes until, according to the terms of his contract with the State, he shall have collected and accounted for all the State taxes for the year for which he was appointed. The appointment of a new collector does not destroy the commission of his predecessor.

APPEAL from the District Court of the First District, *Buchanan, J.*

SIMON, J. We are called upon to decide, whether the collector of State taxes on real estate for the parish of Orleans, appointed on the first Monday of February, 1843, can be authorized to demand of his predecessor the assessment roll of 1842, and other papers belonging to his office, for the purpose of collecting the taxes due thereon; or in other words, the question here presented is, by whom are the State taxes for the year 1842, to be collected.

The defendant, who was the former incumbent, contends, that the appointment of the plaintiff, as collector, has only superseded the duties imposed upon his predecessor for all taxes to be collected on the tax roll belonging to the year 1843; but that it can in no manner impair, or curtail, any of the vested rights of his predecessor as collector of taxes on the roll of 1842.

He further insists that he, as well as the plaintiff, was appointed under the law approved on the 12th of March, 1838, by which he is empowered to collect all taxes due on the roll which was to be delivered to him on the first day of August after his last appointment, which was on the first Monday of February, 1842; that he

has given his bond for the collection of said taxes, and that he cannot be deprived of the benefit of their collection, after having assumed the duties, charges, and responsibility, imposed upon him by law, as collector.

He also maintains, that he is not only borne out in his interpretation of the extent of his legal rights and duties by invariable practice and custom, established at the Treasury Department of the State, but also by express legislation made on similar matters.

Our learned brother of the District Court has disregarded and rejected the respective pretensions of both parties, and ordered that a peremptory *mandamus* should issue, commanding the defendant to deliver over to the State Treasurer, all the receipts for taxes of the year 1842, not collected by him, in order that said Treasurer may make such disposition of them as is provided by the law, under which the contending parties were appointed. From this judgment, the defendant has appealed.

The facts agreed upon by the parties, and shown by the record, are these. They were both regularly commissioned, the defendant on the first Monday of February, 1842, and the plaintiff on the 10th of February, 1843. The defendant's bond is dated the 15th of December, 1842, for the sum of \$65,831; and recites, that "whereas Aimé Guillet has been appointed collector of the taxes on landed property and slaves, in and for the parish of Orleans, if he shall faithfully collect, and account for all taxes of the State within the parish of Orleans for the year 1842, according to law, &c." This bond was regularly approved, according to the second section of the act of 1838.

The testimony of François Gardère, former Treasurer of the State, establishes, that the assessment roll for the collection of State taxes is handed to the collector on the first day of August of each year, according to law; and as soon as the amount of taxes resulting therefrom is ascertained, the bond is required from the collector for that amount; but that owing to delay on the part of the assessors, that amount cannot sometimes be ascertained, until after the delivery of the assessment roll: and that such was the case for last year; in consequence whereof, the bond bears the date which it has. The Treasurer also states, that "the invariable practice at the Treasury Department, whenever any collector of

taxes has been superseded in office, has been to leave with him the assessment roll upon which he had given his bond, and to let him collect the taxes due thereon."

The record contains also a certificate of the State Treasurer showing that the collector entered into bond for the collection of the taxes for the year 1837, on the 14th of March, 1838; for the collection of the taxes of 1838, on the 9th of January, 1839; for the year 1839, on the 1st of December, 1839; for the year 1840, on the 1st of December, 1840; and for the year 1841, on the 2d of December, 1841.

It has also been stated in the arguments, and not denied, that the plaintiff has furnished his bond as collector, for the amount of the assessment roll of the year 1842; so that there appear to exist two bonds in favor of the State, both for the same amount, for the collection of last year's taxes. The last bond, however, has not been produced, and nothing shows that it ever was approved according to law.

The office of collector of State taxes on landed property, slaves, and vehicles, in and for the parish of Orleans, was created by an act of the Legislature, approved on the 12th of March, 1838, (Laws of 1838, p. 96,) the first section of which provides that, "immediately after the passage of this act, and on the first Monday of February, of *every year hereafter*, there shall be appointed by the Governor, by and with the advice and consent of the Senate, a collector of State taxes, &c., whose duty it shall be to proceed to the collection of said taxes, due for the year 1837, and for every succeeding year, in the manner prescribed by law."

The second section of the act makes it the duty of the Treasurer, to deliver over to the collector the assessment roll for the year 1837; "and for every year thereafter the Treasurer shall deliver the said roll to the collector on the first day of the month of August," before which delivery, the collector shall give his bond, &c., to be approved by the Parish Judge of the parish of Orleans, and the Treasurer of the State.

The third section provides for the duties of the collector, and requires him to pay into the Treasury, at the end of every month, the amount by him collected; and to make a final settlement of his account with the Treasury on the last Monday of December of

every year; and then to deliver over to the Treasurer all the receipts for taxes not collected; it being the duty of the Treasurer, "to deliver said receipts to the Sheriff of the parish of Orleans, to be by him collected and accounted for according to law."

It seems to us, that it clearly results from the provisions of this law that the intention of the Legislature was, that a collector of State taxes should be appointed every year, for the special purpose of collecting the taxes due on the assessment roll made for, and during the year of his appointment, without any reference to the collection of the balance of the taxes remaining due for the preceding year. The bond which the collector gives before receiving the assessment roll, to be delivered to him on the first day of August, relates exclusively to the said assessment, and to no other; and the Treasurer is authorized to deliver to him the said roll, (except as to the year 1837,) *for every year thereafter*, that is to say, for every year immediately following his appointment. This interpretation appears to be strengthened by the circumstance, that the act having been passed in March, 1838, it was necessary to provide for the collection of the taxes of 1837; and this was accordingly provided for by the terms of the second section, which makes it the duty of the Treasurer not only to deliver to the collector, to be appointed, the assessment roll which should be ready on the first day of August ensuing, but also that of 1837. This shows, it is true, that the collector first appointed under said act, had the collection of two assessment rolls, but that *for every year thereafter*, only one roll should be delivered to the collector previously appointed. Thus, the collector appointed in February, 1838, was to be put in possession of the assessment roll of 1837, and also that of 1838, to be delivered to him on the first day of August following; and the collector appointed in February, 1839, was to collect the taxes of that year on the assessment roll put in his hands on the 1st of August ensuing, and so on.

With this view of the intention of the law-maker, how can the plaintiff pretend that, under the law of 1838, he is authorized to look behind the time of his appointment, and to claim the collection of the taxes of 1842? The tax roll of that year had been delivered to his predecessor, and the only assessment roll which, under said law, he is entitled to receive, is the one which the State

Treasurer is directed to deliver into his hands on the 1st of August next. Again; the law does not contemplate that he should have any other; as, in establishing a general rule to be followed *thereafter*, the collection of the taxes of 1837 appears to be provided for as an exception required by actual and existing circumstances.

This necessarily brings us to the question, whether the defendant, whose time, as collector, is said to have expired by the appointment of his successor, can continue to execute the duties of his office? We have already expressed our opinion, that the plaintiff cannot be allowed to take the collection of the taxes due for the year 1842, and it is necessary that those taxes should be collected by somebody. By the terms of the defendant's bond, dated the 15th of December, 1842, he contracted the obligation of collecting and accounting for the taxes of the year 1842, and under the third section of the law of 1838, he was to make a *final settlement* of his account with the Treasury, on the last Monday of December last. It is clear that the taxes were not then collected, and that if he had any account to settle, it was for a very small amount. As it is explained by the testimony of the Treasurer, it was not the defendant's fault, and we cannot see any reason why he should suffer from a circumstance over which he had no control. Such circumstances were not foreseen, or provided for, by the law of 1838; under the provisions of which, it seems, that after the final settlement of accounts between the Treasurer and collector, the latter should remit all the receipts for taxes not collected, to be delivered by the State Treasurer to the Sheriff for collection. Thus, the collector had, under the law of 1838, nothing further to do with the collection of taxes, after his general settlement of accounts.

But, by a law approved on the 23th of February, 1840, (Bullard and Curry's Digest, 734, No. 151,) it is enacted that, "the collector of State taxes on landed property, slaves, and vehicles in and for the parish of Orleans, shall enjoy as such, all the powers now vested by law in the several sheriffs of the state, as collectors of taxes." The clear object of this law is to give to the collector, the right and power of enforcing the collection of the taxes in the same manner as the sheriffs of the State are authorized to do. They may act as sheriffs in the collection of taxes,

and this does away with the necessity of delivering to the Sheriff of the parish of Orleans the receipts for unpaid taxes, to be by him collected and accounted for according to law. The act of 1840 repeals and destroys the latter clause of the third section of the law of 1838, in such manner, that, after having settled his account with the State Treasurer, the collector is obviously authorized to keep the receipts for uncollected taxes, and to coerce their payment or collection in the same way as the several sheriffs are empowered to do, as collectors of taxes. It follows, therefore, that after the last Monday of December, the collector is necessarily authorized to continue to keep the assessment roll, and the receipts for uncollected taxes, in his possession; and that he is bound to proceed to the collection thereof, not until he is superseded in his office by the appointment of a successor, who, as we have already said, is only appointed to collect the taxes of the ensuing year, but until, according to the terms of his contract with the State, he shall have collected, and accounted for all the taxes of the State for the year for which he has been appointed; and for that purpose, from the moment that he has settled his general account with the State Treasurer, and even before, if necessary, he is to fulfil the same duties, and is vested with the same powers as are conferred upon the several sheriffs of the state, as collectors of taxes.

It has been insisted, however, that the appointment of a new collector, destroys the commission of his predecessor, and that the time of office of the former incumbent thereby necessarily expires. This, in our opinion, is a *non sequitur*. Again; the new collector is only appointed for the ensuing year, and has nothing to do with the collection of the preceding taxes. We are not ready to say, that the appointment of a collector for the year 1843, supersedes the collector appointed for the year 1842, so absolutely as to prevent him from acting under his former commission in the collection of the taxes remaining unpaid. The law has made them distinct, and we are unable to see any reason why they should not act consistently, each in his separate sphere and capacity, under different and distinct contracts and obligations. It has been said, that the State cannot have several collectors in office, acting at the same time; that this would cause a confusion of

powers and duties. This would be true, if they were fulfilling the same duties, and acting for the same object, or employed for the same purpose. But it appears to us, that two officers, appointed for distinct and different purposes, under separate contracts or obligations, and who, in the exercise of their duties, have not to interfere with each other's rights and powers, may act at the same time, and in the same place, for the benefit, and under the authority of the same employer. Nay, this would rather enhance the security of the State, as the taxes of two years would not be in the same hands ; and, far from creating any confusion, the collectors' accounts being kept distinct and separate, would obviously, be more correctly and more easily rendered to the State Treasurer.

In support of the position which we have adopted, we have been referred to a law of 1815, (Bullard and Curry's Digest, 716, No. 55,) which provides that, "in cases of resignation or suspension in office, all collectors of taxes shall be authorized to proceed with the collection of such taxes as remain unpaid, in the same manner, and under the same responsibility as are, by law, provided in relation to collectors of taxes ;" and the second section of which, *in case of absence of the collectors, or of their failure to pay the taxes, gives the same right and power to their securities, who are authorized to take into their possession, the list of taxes remaining unpaid, &c.* This law, though, perhaps not directly applicable to the question at issue, shows conclusively that the intention of the Legislature has always been, that collectors of taxes should not be interrupted in the legal exercise of their duties, and in the faithful compliance with their contracts ; and that they should execute their obligations *throughout*. Thus, the law makes it their duty, and authorizes them to collect the unpaid taxes, even when they have resigned or are suspended, and this confirms us in the opinion that the object of the law-maker is, that the collection of State taxes should not be divided between two collectors successively appointed, and that the State only looks to the first incumbent, and to no other, for the payment into the Treasury of this branch of its revenue. This is in concordance with the invariable practice adopted by the former Treasurer of the State, and we feel no hesitation in saying that it is, in our opinion,

a correct interpretation of the several statutes which govern the matter under consideration.

In conclusion, we must declare, that the appointment of the plaintiff as collector of taxes, being only prospective in its operation, does not entitle him to the collection of the taxes of the preceding year; that it only applies to the collection of the taxes of the year 1843, under the assessment roll to be delivered to him on the first day of August next; and that the judge *a quo* did not err in disregarding his pretensions: and we must also say, that the defendant has not been superseded in office, by the said appointment, as to the collection of the taxes remaining unpaid for the year 1842; that the defendant ought to be maintained in the exercise of his powers and duties, as such collector, until the taxes of 1842 shall have been finally collected and accounted for in due course of law; and that, in our opinion, the inferior judge erred in commanding him to deliver over to the State Treasurer all the receipts for taxes of the year 1842, yet uncollected.

It is therefore ordered, that the judgment of the District Court be reversed; that ours be for the defendant; and that the rule obtained below be discharged, with costs in both courts.

Preston, Attorney General, for the plaintiff.

Soulé, for the appellant.

OSCAR PILLET v. WILLIAM EDGAR and others.

By the common law, where no execution has been taken out on a judgment for a year and a day, the judgment creditor may render his judgment executory, either by a *scire facias*, or an ordinary suit within twenty years. The remedy is cumulative.

By the laws of this State where a judgment has the force *rei judicatae* he may either obtain an order of seizure and sale, or bring an ordinary suit. C. P. 746, 748.

No execution can be issued in this State on a judgment rendered in another State which has ceased to be executory there, in consequence of no execution having been taken out within a year and a day after it was rendered. The courts of this State cannot enforce a judgment, which the court of the State in which it was rendered, cannot execute.

APPEAL from the District Court of East Feliciana, Johnson, J.

 Pillet v. Edgar and others.

A. M. Dunn, for the plaintiff.

Dalton, for the appellants.

MARTIN, J. The defendants are appellants from a judgment perpetuating an injunction obtained to prevent the execution of a writ of *fiery facias*, on a judgment, in one of the courts of the State of Mississippi, against the present plaintiff, which had lain dormant upwards of a twelvemonth and a day from its rendition, without any writ of *scire facias* having been issued for its revival. Two witnesses, acquainted with the laws of that State, have attested, and indeed the counsel for the defendants has not denied, that, according to the practice in that State, where a plaintiff has suffered his judgment to lie dormant, without taking any execution thereon during a year and a day, it ceases to be executory, until revived by a *scire facias*, requiring the defendant to show cause, why execution should not issue thereon. It has, however, been contended, that the proceeding by *scire facias* is only a means of rendering a judgment executory, after it has lain dormant for a year and day. The proceeding, therefore, belongs to the *remedy*, and not to the *substance* and *nature* of the contract, and must be governed by the *lex fori*. See Story's Conflict of Laws, (2d ed. 1841,) 467, sec. 556; p. 468, 469 and 470; and notes, p. 477, 478, sec. 572; pages 481, 482, 483, 484, 485 to 489. See particularly notes to p. 489. *McElmoyle v. Cohen*, 13 Peters, 312, 327, 328, and *Bulger v. Roche*, 11 Pickering, 36. The remedy under the common law is cumulative. The judgment creditor may make his judgment executory, either by *scire facias*, or an ordinary suit, within twenty years.

Our laws have given the judgment creditor two remedies. If the judgment has the force of *res judicata*, he may either obtain an order of seizure and sale, or bring an ordinary suit. Code of Practice, arts. 476, 748. If the revival of the judgment by *scire facias*, be a proceeding which affects the *nature* and *substance*, or *validity* of the contract, or judgment, and not merely the *remedy*, the want of it would constitute a valid defence to an ordinary action, brought on such foreign judgment. The counsel asks whether this court is prepared to establish this doctrine?

Proceedings by *scire facias* have certainly nothing to do, in the State of Mississippi, with the *nature* and *substance* of a contract;

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for they cannot be resorted to, until the contract has ceased to exist by being merged in a judgment, which, by presumption of law, is considered to have been satisfied by the plaintiff's having refrained from taking out execution, during a year and a day, following its rendition; so that the defendant cannot be disturbed, without the opportunity being offered him, either by a *scire facias*, or a new suit on the judgment, to contest the plaintiff's right to coerce payment. This is admitted to be law in the court which rendered the judgment, the execution of which the present plaintiff resists. The courts of Louisiana cannot enforce a judgment which the court of a sister State, in which it was rendered, cannot execute.

Judgment affirmed.

THE BANK OF LOUISIANA v. JOHN M. SMITH and others.

Where the endorser of a note has died, notice of protest must be sent to his legal representatives. A notice addressed to the deceased by name, will be bad. And plaintiffs must show that a certain degree of diligence was used to ascertain the executor, administrator, or heirs and representatives of the deceased.

Where, in an action against the drawer and endorsers of a promissory note, plaintiffs, after obtaining judgment and execution against the former, order a stay of execution without the assent of the endorsers the latter will be discharged.

APPEAL from the District Court of East Feliciana, *Johnson, J. Lobdell*, for the appellants.

Johnson and Lyons, for the defendants and appellees.

SIMON, J.* This suit was originally brought against Smith the drawer, and Isabella Fluker the only heir and representative of the endorser of a promissory note, and her husband. Judgment having been first obtained against the drawer, an execution was issued against him, during the pendency of the action against his co-defendants, who subsequently joined issue by first denying all

*MORPHY, J., being interested in the question, did not sit on the trial of this case.

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the allegations contained in the plaintiff's petition; and further averring, that the execution issued against the drawer, having been stayed by order of the plaintiffs, until the first day of April, 1840, without their knowledge and consent, they became released from their obligation to said plaintiffs by reason of the endorsement of the deceased, if ever they were bound by the same.

There was judgment below in favor of Fluker and wife, from which the plaintiffs, after a useless attempt to obtain a new trial, took this appeal.

This action is resisted on two grounds; 1st. That legal notice of the non-payment of the note, was not given to the representative of the endorser.

2d. That the extension of time given by the plaintiffs to the drawer of the note, operates as a release of the endorser's liability.

I. The record shows, that the endorser died in June, 1838, and the note sued on was protested on the 18th of January, 1839. The notary certifies, that he put into the post office in St. Francisville two notices of protest, one of which was addressed to Benjamin Kendrick, Parish of East Feliciana, Jackson. This was irregular. The notice of protest, instead of being directed to the endorser *by name*, who had been dead for about eight months previous, should have been sent to his legal representatives. Chitty on Bills, 242. Bayley on Bills, 184, and note *a*. It was the duty of the plaintiffs to show that a certain degree of diligence had been used to ascertain who were the endorser's executor, or administrator, or heirs and representatives. 1 Mart. N. S. 321.

II. The second objection is also fatal. Judgment was obtained against the drawer on the 14th November, 1839; the execution was issued against him on the 9th of January, 1840; and on the 15th of February, the Cashier of the Bank of Louisiana at St. Francisville, wrote to the sheriff the following authorization, which is found annexed to the sheriff's return: "*You will please stay the execution in your hands in the case of the Bank of Louisiana v. J. M. Smith until the first of April next.*" It is perfectly clear that the giving further time to the drawer of the note, without the assent of the other parties thereto, has the effect of discharging them from liability, and of precluding the plaintiffs from exercis-

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ing their recourse against the endorsers. Chitty on Bills, 300.
 Bayley on Bills, 223. 3 Mart. N. S. 598. 7 Ib. N. S. 12. 4
 La. 295.

Judgment affirmed.

PIERRE PAUL BABIN v, JOHN NOLAN.

Courts of Probate have concurrent jurisdiction, with the District Courts, of an action by the heir for the settlement and partition of the community which existed between a husband and wife, after its dissolution by the death of the latter; and the circumstance of the defendant's denying the heirship of the plaintiff, and alleging himself to be the heir, can in no manner change the nature or object of the action, so as to deprive the Court of Probates of its jurisdiction. Nor can its jurisdiction be affected by the fact that the plaintiff's right to inherit must be determined, before proceeding to examine the issues relative to the settlement and liquidation of the community; the competency of the court being determined by the nature of the legal rights which the plaintiff seeks to enforce, and not by the question of his right to recover.

Under art. 1037 of the Code of Practice, Courts of Probate are possessed of all the powers necessary to the exercise of their jurisdiction; and they may consequently take cognizance of questions of title arising collaterally, the examination of which is necessary to the decision of the issue joined.

The principal object of the law requiring a public inventory to be made of all the effects, moveable and immoveable, of a succession or community, is to establish the existence of all the property, and to show the whole amount, or value, thereof. C. C. 1098, 1099, 1100, 1101. Such an inventory is to serve us as the basis of the settlement of the estate, so far as it shows the effects belonging to it, but is not conclusive proof of the real value of the property, nor the exclusive criterion by which those who are interested, are to be charged in the partition and settlement of the estate. Save where the law has declared in positive terms that the property inventoried shall be taken at the estimated value, such estimation is not conclusive.

Art. 2377 of the Civil Code which provides, that when the hereditary property of either of the spouses has been increased or improved during the marriage, the other shall be entitled to one-half of the value of such increase or amelioration, if proved to have been the result of the common labor or expense, does not contemplate, that to ascertain the value of such increase or improvement, every item of improvement shall be estimated separately, and the aggregate amount added to the estimation of the land. This would often be unjust, as the increased value of the property would, in many cases, be far from equal to the original cost of such improvements. The proper course is, to estimate the value of the hereditary property according to its value at the time of the dissolution of the community, but, if possible, in the situation in which it was at the time of the marriage, and then to inquire into its real value, with

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all the improvements existing thereon in the condition in which it was at the time of the dissolution of the community ; and the difference between the two estimates will form the increase, for one-half of which the other spouse should be compensated on the settlement of the community.

APPEAL from the Court of Probates of West Baton Rouge, *Favrot, J.*

SIMON, J. This is an action for a settlement and partition of the estate, in community, between the defendant and his deceased wife, who it is alleged was the plaintiff's sister. The petitioner represents that the defendant's wife, his sister, died on the 22d of July, 1841, leaving no heirs in the descending or ascending lines, and no other brother and sister besides himself, and that he is consequently her sole heir and representative ; that his sister intermarried with the defendant on or about the 13th of January, 1823 ; that on her decease, she left a large estate consisting as well of separate property, as of such as was held in community with her husband, the defendant, and acquired during their marriage ; that at the petitioner's instance, an inventory and appraisement were duly made in 1842, of all the property, effects and rights, moveable and immoveable, belonging to her succession, and the community ; from which it appears that the whole active mass of the succession and community property amounted to the sum of \$187,874, as estimated by the appraisers, exclusive of certain bank stock, and other articles of personal property. He states that he has accepted his sister's succession under the benefit of inventory, and that he is desirous of having a judicial partition of the estate in community. He points out, and gives a detail, of all the property which he claims as his sister's separate estate ; claims his half of the balance of the property put down on the inventory, as community property, and prays that a partition thereof may be decreed to be made according to law, and that he may be put in possession of the separate estate of the deceased. He also prays for judgment against the defendant for certain sums of money, and for the one-half of the value of certain improvements made, during the marriage, on the defendant's tract of land, &c.

The defendant first filed certain exceptions to the plaintiff's action, alleging that the Court of Probates is without jurisdiction to try the matters set forth in the plaintiff's petition ; and that this is

an action of revendication, for the recovery of real rights, which involves the title to property, and not a succession held in common by co-proprietors. He also excepted to the inventory annexed to the plaintiff's petition, as having been made *ex parte*, and as not binding upon the respondent, contradictorily with whom it should have been made. He concludes by alleging as a further exception, that the allegations contained in the plaintiff's petition, are vague, uncertain, insufficient, and unsatisfactory; that they do not enable the respondent to answer said petition, in a proper manner, and that he cannot answer the plaintiff's demand, until he supplies the defects by an amendment to his petition, &c.

The defendant's exceptions having all been overruled by the inferior court, he filed an answer to the merits, in which he first pleads the general issue, and expressly denies that the plaintiff is the legitimate brother, of his (defendant's) late wife. He denies specially that the plaintiff is the son of the father and mother of the deceased. He denies also that he is entitled to any part of the property by him sought to be recovered, or that he has any title whatever to any part of the property specified in his petition; and renews his plea to the jurisdiction of the court by averring that this, being a question of title, cannot in any manner be tried by the Court of Probates.

The defendant proceeds, in his answer, to specify the property which he owned at the time of his marriage, and the sums of money which he brought into the community, and which were employed and used, subsequently, for its benefit. He gives a long detail not only of all the property, real and personal, moneys and credits composing his separate estate, and which exist in kind, but also of all the effects which were acquired during the marriage, and since the dissolution of the community. He further alleges that the inventory on which the plaintiff's action is based, is not binding upon the defendant, the same having been made *ex parte*, and being illegal and irregular; that he, said defendant, protested against it, at the time, and only signed it with the express understanding that his legal rights should be reserved; and he denies being accountable to the plaintiff, for any part of the property thus illegally inventoried. He further states that sundry articles of property, which he specifies, were not placed on the inventory;

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that the slaves of his wife did not come into his possession until 1836 or 1837, before which time the improvements estimated in the inventory, had been made, erected, and finished; that one-half of the community property, as shown by the inventory, belongs to him, and that the other half is bound and liable to pay him the sum of \$108,700, the amount of the proceeds of the obligations, mortgages, notes and other credits, and of the sales of his separate property alienated and sold since the marriage, and which were employed, used and advanced by him, for the use and benefit of the community. He also avers that, in default of legitimate heirs of his wife, he is in law entitled to inherit the whole of her estate; and concludes by praying that the plaintiff's demand may be rejected; that a judgment may be rendered in his (defendant's) favor, for his separate property, and for the sum of \$108,700, with interest; that said sum be adjudged to be a privilege and lien on his wife's moiety of the community property; that he be allowed to retain possession of the same until his advances are fully paid; and that it be decreed that his late wife died without leaving any heir or relation; and that the defendant, as her surviving husband, is in law entitled to inherit the whole of her estate.

There was judgment in favor of the plaintiff, recognizing him as the only heir of the defendant's late wife; establishing and specifying the property which belongs to the parties respectively and separately; liquidating the various sums shown to be due to the defendant by the community, as also to the plaintiff in right of his deceased sister; and finally ordering a partition to be made according to law, between the plaintiff and defendant of all the property, real and personal, rights and credits held by them in community, and referring the partition to a notary public appointed by the court. The judgment further decrees a mortgage and privilege in favor of the plaintiff on the defendant's property, for the restitution of the amount brought into marriage, or subsequently acquired during the marriage by the deceased, and for the reimbursement of the one-half of the price of the lands declared to be the separate property of the defendant, and the one-half of the value

of the improvements made thereon. From this judgment, the defendant has appealed.

Before proceeding to the examination of the facts of the case, as disclosed by the voluminous record now under consideration, and before inquiring into the correctness and legality of the various opinions expressed by the inferior judge, on the numerous points of law incidentally raised, during the progress of the trial of this suit, which incidental points form the subject of twenty-six bills of exception, our attention is arrested by the question of jurisdiction which grows out of the exceptions filed by the defendant.

It is contended that this is an action of revendication, which strictly involves a question of title, based on heirship, each party setting up title exclusively in himself to the succession of the deceased; and that, therefore, the Court of Probates, being a tribunal of limited jurisdiction, could not try this case, which is not one of those expressly or impliedly coming under its powers.

We had thought from the repeated decisions of this court, on a subject so often brought to our notice, that this was no longer a debateable question, and that this matter was generally understood as having been definitively settled in our jurisprudence; but the defendant's counsel appear to be under the impression, that this case presents a question of jurisdiction, entirely different and distinct from those which we have hitherto had occasion to notice, and that the circumstance of the defendant's denying the alleged heirship of the plaintiff, and alleging the right of inheriting to be in himself, forms a first and preliminary question of title, which cannot be submitted to and decided upon by the Court of Probates, without violating the rules pointed out and established by our laws on the subject of jurisdiction.

It does not seem to us that the issues made by the defendant, can in any manner make any material change, in the nature and object of the action instituted by the plaintiff. It is essentially an action for the settlement and partition of the community, in which the plaintiff, in the right of his sister, who was the defendant's late wife, seeks to ascertain, establish, and recover the portion to which the deceased was entitled in the active mass of the community; and ever since the decision of this court in the case of *Turner v. Collins*, (1 Mart. N. S. 370,) Courts of Probate have been re-

peatedly and uniformly recognized in our jurisprudence to have jurisdiction, if not exclusive, at least concurrent with the District Courts, in such cases. In the case of *Broussard v. Bernard*, (3 Mart. N. S. 37,) which originated in a suit instituted by the heirs of the wife against the husband, for the division of the community property, this concurrent jurisdiction was positively recognized; and so it was again decided in 3 Mart. N. S. 172. 7 Ib. N. S. 470. 9 La. 584.

It is true that, in this case, the question whether the plaintiff is entitled to inherit is first to be determined, before proceeding to the examination of the issues relative to the settlement and liquidation of the community. It is true also that, until he shows his right of heirship, the community is not to be inquired into; and that the defendant has, until then, no account to render to the plaintiff from the administration of the common property. But we must not confound the right of action, which the plaintiff is necessarily bound to set up, and which he must prove when the other party requires it, with the object and nature of the action itself. It is based here upon the fact that he is the heir of the deceased, and this, like any other fact, is required by law to be shown, before his being enabled to exercise the action brought before the competent tribunal. Such competency is not to be tested by the mere question, whether the plaintiff, is or not entitled to institute the action; but, by the nature of the legal rights which he seeks to enforce in the exercise of his action. So, under arts. 1000, 1001, 1002 and 1003, of the Code of Practice. The law requires that the heirs who claim a succession should first establish their right of heirship, that is to say, *their title* to the succession; and it is only after the Judge of Probates is satisfied that they are entitled to it, that he orders them to be put in possession of the estate which is the object of the action, and directs the administrator to render his account. In this case, the action is clearly one for the liquidation and partition of the community, and is directly under the application of the doctrine recognized by us in the case of *Lawson v. Ripley*, 17 La. 246, in which the present question was fully investigated, and where the jurisdiction of the Court of Probates, was decided to be, in such cases, *concurrent* with that of the District Court. In many similar cases brought before this

court, the question of jurisdiction was not even raised; and although the want of jurisdiction would be one *ratione materiae*, this tribunal always decided the matters in controversy on their merits, without entertaining any doubt as to the jurisdiction of the Courts of Probate from which the appeals were brought up. See 10 La. 172. 1 Robinson, 149, 271, 512.

We must not lose sight also of the powers given by law to Courts of Probate, which, under the 1037th art. of the Code of Practice, possess all such powers as may be necessary to enforce their jurisdiction. Accordingly, we have often held that, in matters of which they have jurisdiction, the Courts of Probate must take cognizance of the questions of title which arise collaterally before them, and the examination of which is necessary to the decision of the issue joined. 5 Mart. N. S. 217. 6 Ib. N. S. 298. 8 Ib. 465. 12 La. 218. 17 Ib. 249.

Having thus disposed of the question of jurisdiction, by sustaining the jurisdiction of the court *a qua*, we shall now proceed to the examination of such of the numerous bills of exception, as may be necessary for the final adjustment of the rights of the parties.

The first bill which we have to notice is one relative to the introduction of certain certificates of birth and marriage, in support of the plaintiff's legitimacy. They were admitted by the lower court, but an attentive examination of the record has enabled us, without the aid of those certificates, to ascertain the fact sought to be proved by them. The parol and other written evidence adduced by the plaintiff shows conclusively, that he was always considered as a child from the legitimate marriage of the defendant's wife's father and mother, and that consequently he was *her brother*. The testimony on this important fact stands uncontradicted, and it cannot, in our opinion, be disputed that, without the certificates objected to, the plaintiff's legitimacy is satisfactorily established.

The next is taken to the opinion of the inferior court which received the inventory annexed to the plaintiff's petition, as *legal evidence* of the value of the property and of the improvements. This document was objected to on the ground that it is an *ex parte* proceeding, made at the sole instance of the plaintiff, and is

illegal, irregular, and not binding upon the defendant. It seems to us, that the objections made go rather to the effect of the evidence, than to its admissibility; but as this is perhaps the most important point which this case presents, we shall at once examine the effect and legality of the evidence, and express our views upon the force and extent which the lower judge has given to the contents thereof, as to the value of the improvements made, during the marriage, upon the tract of land claimed by the defendant as his separate property, without considering or attaching any importance to the technical objections made by the defendant's counsel to the admission of the document, otherwise than as proof of what it contains.

This inventory was made at the request of the plaintiff, and was begun on the 26th of January, 1842. Its not being signed by the defendant would perhaps raise the presumption that it was made in his absence; but we find at the close of it, dated the 28th of January, a sworn declaration of the defendant, in which he states *under oath*, that "*he had brought forward all the credits of the community which existed between him and his deceased wife, and had caused to be inventoried and appraised all the real and personal property, belonging either to said community, or to him and his said wife separately, to the best of his knowledge and belief.*" From this declaration, we must conclude that the defendant was present at the inventory, and that it was not made *ex parte*; for the defendant's statement, that he caused the property to be inventoried and appraised, includes necessarily the idea that he was there all the time to point out the property to the appraisers.

Taking therefore the inventory under consideration, as an act made with the consent and in the presence of the parties interested, what does it prove? The principal object of the law, in requiring a public inventory to be made of all the effects, moveable and immoveable, belonging to a succession or to a community, is to establish the existence of all the property, and to show the whole amount or value thereof. Such inventory is to contain the estimate of all the effects to be made as to each article, by appraisers, who must be appointed and sworn by the judge or notary who makes the inventory: (Civil Code arts. 1098, 1099, 1100 and 1101;) and after it has been registered, it shall be admitted as

proof in courts of justice. Ib. art. 1103. Such an inventory is to serve as the basis of the settlement of the estate, so far as it shows the effects, moveable and immoveable, moneys and credits belonging thereto, and so far as it establishes its situation; but we are not ready to say that it should be received as conclusive proof of the real value of the property therein described, so as to be used as the exclusive criterion by which the interested parties are to be charged, in the partition of the property, and settlement of the estate. Except where the law has positively said that the property so inventoried shall be taken at the estimation price, we understand that the estimation made by the appraisers, not being conclusive, must often yield to the proof of its being excessive or incorrect.

Now, in this case, the judge, *a qua*, says in his decree, that, disregarding the testimony adduced by the parties in relation to the value of the improvements made during the marriage, which testimony he considered as incoherent and contradictory, he took *for basis* and *as a criterion*, the value which was set thereon by the two sworn appraisers at the time of the inventory. Those appraisers were not examined on the trial of the cause, and if their estimation was to be taken as proof of the value of the property, it would follow that, without being sworn witnesses, according to art. 478 of the Code of Practice, and without any opportunity being afforded to either of the parties to cross-examine them, their statements would be received as evidence on the most important and material facts, which in a case like this, are to be brought under the consideration of the court.

We think the inferior court erred. The inventory produced by the plaintiff contains a separate estimation of all the improvements made during the marriage on the defendant's tract of land, and of the tract itself. It shows the estimate of the land to be at the rate of \$50 an *arpent*; every article of improvement is estimated separately; and it contains also the statement made by the appraisers, that the appraisement put upon the landed property claimed by the defendant, was intended to be \$30 a superficial *arpent* for the woodland, and \$20 for the clearing of the same; and that the twenty dollars should be considered as an improvement, and ought of right to belong to the community. This estimation was adopt-

ed by the court below, which charged the defendant not only with the value of the improvements, as shown by the inventory, but also with those resulting specially from clearing and ditching the defendant's land. Now under art. 2377 of the Civil Code, "*when the hereditary property of either of the spouses, has been increased or improved during the marriage, the other shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved, that such increase or ameliorations are the result of the common labor, expenses or industry;*" but no reward is to be due, if the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade. We do not understand this law to mean that, to ascertain the value of the *increase* or improvement, every article of improvement should be estimated separately, and the amount of the aggregate added to the estimation of the land. This would often be unjust, as the relative increase of the property might, in many instances be very far from being adequate to the costs and expenses which the ameliorations originally occasioned; and one of the spouses, or his or her heirs, would perhaps thereby enrich themselves to the prejudice of the other. The safest rule, in our opinion, to be adopted would be: first to put an estimate upon the value of the naked property, if unimproved at the time of the marriage, or, to estimate it, according to its value *at the time of the dissolution of the community*, but if possible, *in the situation in which it was at the time of the marriage*, and then to inquire into the real value of the hereditary property with all the improvements existing thereon, *in the condition in which it was at the time of the dissolution of the community*, and the difference, between the two estimations, will form *the increase*, for one-half of which the other spouse should be compensated in the settlement of the community, according to the article above quoted. This was not done below; and although the record contains the testimony of several witnesses examined to ascertain the value of the property with and without the improvements, their evidence is so contradictory that we think justice requires this case should be remanded for the purpose of ascertaining, either by experts, or by further testimony, the exact value of the increase or improvements

in controversy, according to the rule by us adopted under art. 2377.

With regard to the increase of value of the defendant's land, resulting from its having been cleared and ditched during the marriage, we think it ought not to be *especially* allowed. It appears to us that such clearing and ditching were necessary for the cultivation of the land, from which the community was benefitted; and that if any advantage has been derived to the defendant by increasing the value of his land, such increase will necessarily be accounted for, and included, in the estimation thereof made under the rule above established.

The next is a bill of exceptions to the court's overruling the motion of the defendant for a continuance. We shall not inquire into the grounds on which the continuance was refused; for, as the case is to be remanded, we can see no objection to the defendant's being allowed to produce such further evidence as is alluded to in his affidavit, and which may serve to ascertain his rights, and to support such of his pretensions as, for want of evidence, may have been disregarded below. He cannot be permitted, however, to offer any other proof.

The next is a bill of exceptions taken to the court's refusal to receive in evidence, certain sales of slaves made by the defendant previous to his marriage. Those sales are dated in 1820, and the considerations therefor appear to have been collected, and paid, previous to the marriage. It is clear, that those sales cannot be received as evidence of separate money or property brought into the community by the defendant, as, if he, at the time of his marriage, really had the money which he is entitled to claim from the community, the origin of such funds is immaterial and irrelevant. The defendant cannot be allowed to recover any other sums but those, which he can prove that he brought into the community.

We have attentively examined all the other bills of exceptions contained in the record. Several of them are unimportant, and many of the others relate to the points already disposed of, and particularly to the value of the improvements so much contested between the parties, and to the evidence by them adduced respectively, in support of what they conceived to be a correct estimation thereof. It does not seem to us that any of the bills of ex-

ception, which we do not think necessary to notice here specially, require our interference ; and we have been unable to discover that any error has intervened to the prejudice of either of the parties, from the opinions of the judge, *a quo*, as expressed in those bills.

On the merits, after a careful and attentive perusal of the voluminous record submitted to our consideration, it does not appear to us that any error has been committed, except, so far as the judgment appealed from allows the value of the improvements, according to the estimation and statements contained in the inventory, and which form the items of \$36,430, among those complained of by the defendant. This should be corrected in conformity with the rule above established. *The rest of the judgment seems to us correct. The case was fully investigated in the lower court ; and from the admissions made by the parties as shown by the record ; from the different titles and documents by them established ; and from the parol evidence by them adduced respectively, we have come to the conclusion that there is nothing in the judgment, except as above stated, which requires us to disturb it.

It is therefore ordered, that the judgment of the Court of Probates, so far only as it allows the value of the improvements made during the marriage on the defendant's landed property, according to the estimation put upon them by the appraisers as shown by the inventory, be annulled : that the case be remanded to the lower court for further investigation, as to the value of such increase and ameliorations as may be the result of the common labor, expenses, and industry, according to the principles above recognized : that in all other respects, except so far as it may be necessary to amend or modify it, after the defendant shall have produced the evidence alluded to in his affidavit for a continuance, and which he shall be permitted to offer before the inferior court on the remanding of this case, and no other, the judgment appealed from be affirmed ; and that the costs of this appeal be borne by the appellee.

Robertson and R. H. Chinn, for the plaintiff.

Brunot, Lobdell, and Labauve, for the appellant.

Tutorship of Francis Hacket and another, Minors.

**In the matter of the TUTORSHIP OF FRANCIS HACKET and another,
children of FRANCIS HACKET, deceased.**

Where the accounts of the tutor of a minor heir, presented to the Court of Probates for approval, are opposed by the latter, a co-heir may intervene in the proceedings, for the purpose of obtaining from their common tutor a legal settlement of their ancestor's estate. The cause of action is the same, and both claim in the same right. C. P. 389, 390.

A minor who, after becoming of age, has accepted the accounts of his tutor, and given him a receipt in full and discharge from all claims, may, within four years after her majority, institute a direct action against him respecting the acts of the tutorship, or oppose his discharge when applied for by him; and she will be relieved, on proof that she acted in ignorance of her rights. C. C. 355, 356, 1815, 1841.

Where the tutor of a minor, also the tutor of the minor heirs of a former tutor of the same minor, tenders in the Court of Probates, in his double capacity, his account to his late ward after his majority, it will be no objection, on an opposition by the latter, claiming a tract of land, or its proceeds omitted in the account, and alleged by the tutor to belong to the community which existed between the former tutor and the mother of the other minors, that the judgment, if in favor of the opponent, would be in substance against the heirs of such former tutor, who are not parties to the proceedings, and that the question is one of title, not within the jurisdiction of the Probate Court. The minor heirs of the first tutor are represented by their tutor, the only person authorized by law to represent them; and the Court of Probates is empowered to determine questions of title, arising collaterally on the trial of other matters within its jurisdiction.

A. had two children by his wife, who, after his death, married B., by whom she also had children, and B. became the tutor of the children of the first marriage. B. having died, C. was appointed tutor to the issue of both marriages, and after the majority of the children by the first husband, presented his accounts to the Court of Probates, both as their tutor, and as tutor of the minor heirs of their first tutor. On an opposition to the approval of the account made by the heirs of the first marriage, claiming the proceeds of a tract of land, included in an inventory made after the death of the wife, of the community which existed between her and her second husband, which had been adjudicated to the latter as property common between him and his children, and which, after his death, was sold as belonging to his succession, it was proved that the land belonged to the father of the opponents before his marriage. The land was claimed by the heirs of B., under an act of sale executed by A. to D., from whom they derived title. D. being sworn as a witness testified, that the land had been conveyed to him by A., but that he had never paid any part of the price, nor taken possession of the land, there being an understanding between A. and himself, that he should re-convey the land when required; that after A's death, in consideration of receiving back a note he had given for the price from B., he conveyed the land to B. and his wife, believing that thereby the legal title thereto would be vested in the heirs of A. The tutors excepted to the admissibility of

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this evidence, on the ground that A. having been a party to the sale to D. the opponents, his heirs, cannot, any more than he could, prove its simulation, without producing a counter-letter. *Per Curiam*. If such a letter had been taken by A., as the evidence renders probable, it must have fallen into the hands of B. their tutor, and the very person who they allege attempted to defraud them. Under such circumstances they should, perhaps, be permitted to prove the simulation by parol.

As a general rule, written titles are conclusive between the parties, and they are estopped from contradicting them; but third persons, not parties to an act, may prove its simulation by parol, or that an act purporting to be a sale, was in truth a *dation en paiement* for the benefit of such third persons, and this especially where fraud is alleged.

On an opposition to an account rendered by a tutor, a witness will be allowed to prove that the tutor told him that he had sold a slave belonging to his ward for a certain sum. *Per Curiam*. The testimony does not go to make out a sale or transfer of a slave, or to affect the title to one, but to establish the receipt of money by the tutor for property disposed of by him, for which he must account.

Where the property of minor heirs has been illegally sold, though not bound by the proceedings, they may on coming of age ratify the sale, and claim the proceeds.

A tutor is not chargeable with more than five per cent interest per annum, on funds received by him for his minor. Act of 19th February, 1825.

APPEAL from the Court of Probates of West Baton Rouge, Favrot, J.

The pleadings and evidence in this case are accurately re-cited in the opinion delivered by

MORPHY, J. The petitioner represents that he is the dative tutor of Francis Hackett, junr., one of the two children of Francis Hackett, born of his marriage with Maria Adams, both deceased; that before his appointment, Francis Hackett, junr. had had two tutors in succession, to wit, his mother Maria, and, after her death, James Hackett, her second husband; that he has also been appointed tutor to the three minor children left by the late James Hackett; and that he is now desirous of tendering to Francis Hackett, his late ward, now of full age, an account in his double capacity as his tutor, and as tutor of the minor heirs of James Hackett. Annexed to the petition is a statement or account, showing in favor of Francis Hackett, junr. a balance of \$2254 13. The petition concludes by praying, that the administration of the former tutors as well as his own, may be approved, and that he may be discharged from his trust. Francis Hackett filed an answer or opposition stating in substance, that the account does not contain a correct statement of his rights; that instead of the sum allowed

him, he is legally and justly entitled, as one of the heirs of the late Francis Hacket, to \$11,761 25. The answer avers, that a tract of land of four hundred and ten superficial *arpens*, which was the separate property of the respondent's father, acquired before his marriage with Maria Adams, was erroneously included in an inventory taken on the 1st February, 1832, of the community which had existed between his mother and her second husband James Hacket : that this land was sold by Francis Hacket, on the 16th of July, 1817, to one Michael Adams, for the sum of \$7000, but continued to remain in the possession of the former and his heirs, until the 21st of June, 1824, when said Michael Adams, by an authentic act, executed a sale of the premises to Maria Hacket and James Hacket, apparently for the sum of \$7,500 in cash, but that in truth nothing was paid in cash by the mother of respondent, or her second husband, to the said Michael Adams, whose sole and only object in making a reconveyance of the property was to reinvest the heirs of Francis Hacket with the title to the same, and to free himself from the payment of a note of \$6000 which he had given for the land, and which he appeared by the inventory, taken after Hacket's death, to owe to his estate : that notwithstanding the aforesaid sale and re-sale, the land in question has never ceased to belong to Francis Hacket and his heirs ; and that any attempt on the part of James Hacket, or of the petitioner, as the tutor of his heirs, to make said land community property of the second marriage, by reason of the re-sale executed by Michael Adams on the 21st of June, 1824, is a fraud on the rights of the respondent and his sister Elvira. The answer further sets forth, that on the death of Maria Hacket in 1832, the said tract of land, together with the slaves Betsey, and her children, Arthemise and Lise, which were also the separate property of Francis Hacket, and the slaves Barney, Mehaly, and Jane, which belonged to the first community between Francis Hacket and Maria Adams, were erroneously and unlawfully adjudicated, at the price of appraisement, to James Hacket, as property common between him and his three children, and at his death were sold, in 1839, as belonging to the succession, at the instance of the petitioner the tutor of his minor heirs. That the rights of the respondent, and his sister Elvira, to all the separate property of their father, and

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to one half of the community property between their father and mother, were not in any wise affected by the family proceedings had in 1832, and that so far as the same were intended to apply to the property of their father, and to vest any title thereto in James Hacket, they are absolutely null and void. The answer further avers that the property which rightfully belonged to Francis Hacket, and which descended to his two heirs, was sold, in 1839, for \$23,522 50, one-half of which sum the respondent is entitled to claim, as he is willing to ratify the sale thus made by the petitioner, who has received the proceeds of the said sale as tutor of the heirs of James Hacket. The answer concludes with a prayer that the account filed may be rejected, and that the respondent do recover of the petitioner the sum of \$11,761 25, with interest from the 1st of February, 1832.

The issue being thus joined, Elvira Hacket intervened, and adopting as a part of her petition, the answer of her brother Francis Hacket, she represents that she has a right to intervene and demand a legal settlement of her father's estate, which would entitle her to claim and recover of the petitioner the like sum of \$11,761 25, subject to a credit of such sums as she has already received from him. She further shows, that on the 1st of May, 1839, James Hutchiss presented her a statement, showing that as one of the heirs of Francis Hacket, she was entitled to receive, in principal, only \$2176,27; that implicitly relying upon her former tutor's averment, in his account, that her rights were shown to be such, as he represented them, by the archives of the Court of Probates, she was misled and deceived as to her real rights, and unadvisedly signed the account acknowledging its correctness; that afterwards, to wit, on the 13th June, 1839, she was persuaded and induced by said Hutchiss to appear before a notary, and, on receiving from him the aforesaid amount, to give him an acquittance and release, all of which was done in entire ignorance of her rights as heir of Francis Hacket, and without any knowledge of the fraud practised by James Hacket to divest her and her brother of their legitimate rights; that the said Hutchiss well knew, when he induced her to approve his account, that it was not and could not be supported by the archives of the Court of Probates; that under such circum-

stances the acknowledgment she signed, and the discharge she granted, should not prejudice her rights, and preclude her from recovering what she is legally entitled to. Under these pleadings the parties went to trial, whereupon the Court of Probates rejected the accounts now and formerly rendered, and decreed that the tutor, James Hutchiss, should pay to the intervenor, and to the respondent, \$9,033 04 cents each, after deducting therefrom the sums respectively received by each. The tutor has appealed.

Labauve, for the appellant. The right of Elvira Hacket to intervene in this case, must be tested by articles 389, 390, of the Code of Practice. Art. 389 declares that, "An intervention or interpleader is a demand by which a third person requires to be permitted to become a party in a suit between other persons, either by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff." Art. 390 provides that, "In order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit." Here, the intervenor does not join the tutor, nor the opponent; nor does she oppose both, as permitted by sect. 10 of the act of 7th April, 1826, amending the Code of Practice. Her demand is separate and independent. She claims \$11,761,25 for herself; the opponent demands other \$11,761,25 for himself. She neither claims the same thing, nor any thing connected with the object demanded by the opponent. The issue in the case between the original parties is, whether Hutchiss shall pay to Francis Hacket, the opponent, \$11,761,25, instead of the sum stated to be due in his account. The intervenor comes in and alleges that *another* account, rendered by Hutchiss to her, was erroneous and should be so declared, and that she also should recover from Hutchiss \$11,761,25 instead of the sum allowed her by the account already rendered. This intervention raises a new and distinct issue—that is, whether the account formerly rendered to her should be annulled, and a different sum paid to her. The decision of the issue between the original parties could in no manner affect her rights; and she cannot, consequently, sustain her intervention. 7 Mart. N. S. 196. She has no interest in the \$11,761,25 claimed by the op-

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ponent; and an interpleader cannot change the issue. 5 Mart. N. S. 501.

The court below erroneously admitted the testimony of Adams to contradict the written acts of sale by Francis Hacket to Adams in 1817, and by Adams to James Hacket in 1824. Its tendency is to destroy those acts; to divest James Hacket and his wife and their heirs, and to vest the estate in the heirs of Francis Hacket. Its admission is in violation of two settled principles; it is the admission of parol evidence, *first*, against the contents of a written act; and *secondly*, to prove title to real property. Civil Code, arts. 2255, 2256. 12 Mart. 418. The opponent and intervenor claim as heirs of Francis Hacket, and they are like himself, bound by the act signed by him. Civil Code, art. 2233. Between the parties, nothing but a counter letter can be received to contradict a written act. 19 La. 409. The sale by Adams to James Hacket and wife, in 1824, for cash, vested in the purchasers and their heirs, a complete title to the property. 10 La. 181. The object of Adams' testimony is to divest this title.

The wife of James Hacket, the mother of the opponent and intervenor, having died in 1832, leaving children by her two husbands, an inventory of all the property was made, the price of which is now claimed by the opponent and intervenor. All this property was adjudicated, at its appraised value, to James Hacket, the surviving husband, under the advice of a family meeting, and a decree of the Court of Probates. James Hacket having subsequently died, the property was again appraised, and sold as belonging to her succession. The opponent and intervenor now attempt to ratify the last of these two sales, and to claim the price. This they have no right to do. Suppose that there had been several more of these sales, could they ratify any one at their choice?

Elam, contra.

MORPHY, J. Two points have been made, which, as they apply only to the intervening party, we will first consider. It is said, that Elvira Hacket was improperly permitted to intervene in this suit, as her demand is a separate and independent one; that she does not claim the same thing as Francis Hacket or any thing connected with it; that she claims for herself the same sum of

money, to be sure, as he does, but that there is not, between the two demands, that identity, or connection, contemplated by article 389 of the Code of Practice. We think otherwise. Elvira Hacket seeks to join her brother and co-heir, in order to demand from the same person a legal settlement of their common father's estate. The thing which both claim is the same, and the grounds on which it is claimed are the same. Having a similar cause of action, and claiming in the same right, nothing could have prevented her from joining in the action when originally brought; if so, why should she not be permitted to unite her efforts to those of her co-heir, in the prosecution of their common claims against the plaintiff? We can see no good reason why it should not be so, and we believe that this case is precisely one of those provided for by the Code of Practice, Arts. 389, 390.

It is next urged, that Elvira Hacket is estopped from setting up the same claims as her co-heir, because, in 1839, she accepted her tutor's account after becoming of age, and gave him a full receipt and discharge for all claims she had against him, as well as against the estate of James Hacket her former tutor; and that by so doing she has ratified the adjudication made to James Hacket, in 1832. To this the interpleader answers, that these receipts and acquittances were the result of error on her part, created by the false representations and assertions made to her by her tutor, in the very account she accepted. We are not generally disposed to listen to parties who seek to annul contracts, deliberately entered into, on the score of error, except in cases where such error is clearly made to appear. The account rendered in 1839, states the sum of \$2528 59, as being that coming to Elvira from the estate of her father and mother, and refers for its correctness to a settlement and liquidation of their estates, which, it is averred, had been made in the Court of Probates by James Hacket, her former tutor, on the 20th January, 1832. It appears that no such settlement of these estates has ever taken place; nor has any attempt been made to show, on what basis this account was rested. If its correctness cannot be supported by the archives of the Court of Probates to which it refers, and if, on the supposed truth of such reference, it was accepted by the interpleader, it is clear that she was deceived, and acted in error.

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She must have supposed that the settlement and liquidation spoken of, had been made contradictorily with her under-tutor, more experienced than herself, and whose duty it was to see her rights properly stated, and correctly adjusted. She was a minor at the time of the adjudication made to James Hacket; and nothing in the evidence induces the suspicion, that when she signed the account she had the least knowledge of her rights to any part of the property thus adjudicated, and intended to abandon them. On the contrary; all the circumstances of the case fully satisfy us, that she acted throughout in entire ignorance of her rights, and that she should not be concluded by the acquittance and discharge thus unadvisedly signed, especially when they are opposed to her by the very party who led her into error. Civil Code, arts. 1815, 1841. 10 Peters' Rep. 735. It is not pretended that she is not within the four years during which a minor, after arriving at the age of majority, can institute a direct action against his tutor respecting the acts of the tutorship; and it may be added, that the settlement or receipt relied on are not, perhaps, in such strict accordance with the requirements of law, as to be binding on her Civil Code, arts. 355, 356.

Before answering to the merits, the petitioner excepted to the reconventional demand and intervention set up by the heirs of Francis Hacket; on the ground, that a judgment allowing their claims would in substance be a judgment against the heirs and representatives of James Hacket, when they have not been made parties to this suit; and moreover, that the Court of Probates would be made to try questions of title between the children of the two marriages, when it is without jurisdiction to try such issues. The judge below rightfully overruled these exceptions. The plaintiff is now rendering an account to the children of Francis Hacket, not only of his own tutorship, but also of the tutorship of James Hacket, their former tutor, whose minor heirs he represents; they are therefore in court, and their rights are defended by the person alone authorized by law to stand in judgment for them. As to the question of title, it must necessarily be decided by the inferior court, which is called upon to determine what proportion of the funds, in the hands of the petitioner, is coming to the children of the first marriage, and what claims the latter have

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against their former tutor, James Hacket, for the property they had in his possession, or of which, they alleged he attempted to divest them, by causing it to be adjudicated to himself. We have uniformly held that the Court of Probates can try questions of title, when they arise collaterally in the determination of other matters within its jurisdiction. 5 Mart. N. S. 214. 6 Ib. N. S. 304. 8 La. 463; and see case of *Babin v. Nolan*, just decided, ante, p. 278.

On the merits, the oral and documentary evidence in the record fully establishes, that the land and slaves, the proceeds of which are claimed by the heirs of Francis Hacket, belonged to their father before his marriage with Maria Adams. In relation to the land of 410 *arpens*, it has been shown that, instead of the price of \$7500, mentioned in the sale of the 21st of June, 1824, as having been paid, in cash, to Michael Adams by James Hacket and his wife, the only consideration obtained was the return of a note of the vendor for \$6000, which he had executed to Francis Hacket, when the latter sold him the same land on the 16th of July, 1817; that Adams never made the cash payment of \$1000 mentioned in this last sale, and never took possession of the land, which always remained in the occupancy of Francis Hacket, between whom, and Adams, there was an understanding, that the land should be re-conveyed whenever Hacket should require it; that after the death of the latter, in order to free himself from the liability he was seemingly under, Michael Adams reconveyed the land to Maria Hacket and James Hacket, and received back his note of \$6000, inventoried as due to Hacket's estate, believing, as the witness says, that thereby the legal title to the land would be reinvested in the heirs of Francis Hacket. But these facts have been stated by Michael Adams himself, whose testimony, taken under a commission, was objected to; and the bill of exceptions taken to the opinion of the court admitting it, presents one of the difficulties of the case. We believe, however, that the judge did not err. It is said that Francis Hacket, the father of Francis and Elvira Hacket, having been a party to the sale of 1817, they cannot, any more than he could, prove its simulation without producing a counter letter. If one was taken by their father, as the evidence renders probable, it must have fallen into the hands of

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James Hacket their tutor and step-father, the very person who, they allege, attempted to defraud them of their property by taking a sale of it in his own name in 1824, when a reinvestiture of the title in them, as heirs of Francis Hacket, was intended by the vendor. Under such circumstances, perhaps, they should be viewed in the light of third parties, and be permitted to prove the simulation by parol, especially; when the witness offered is the other party to the sale, in a contest with whom they could prove the simulation by propounding to him interrogatories to be answered under oath. But be this as it may, the appellees were not parties to the sale of the 21st of June, 1824. The general rule certainly is, that written titles form full and conclusive proof between the parties, and that they are estopped from contradicting them; but the exception is equally certain, that persons not parties to an act, may prove its simulation by parol, or may prove, as in the present case, that the act, although purporting to be a sale, was in truth a *dation en paiement*, made for the benefit of such third persons, and the exception holds especially where fraud is alleged. *De la Houssaye v. De la Houssaye et al.*, 7 Mart. N. S. 203. *Prudence v. Bermodi and others*, 1 La. 240. *Badon v. Badon*, 6 La. 258. *McCarty v. Bond's Administrator*, 9 La. 356. If by the re-sale executed by Adams, this land was really given in payment to the heirs of Francis Hacket, for a debt due to their father, they have, we apprehend, the same right of ratifying the transaction by claiming the land, as minors, who on arriving to the age of majority, can ratify sales made of their property, by claiming the proceeds. 6 Mart. N. S. 21. 2 Ib. N. S. 614.

Another bill of exceptions was taken to the admission of a witness to prove that James Hacket told him that he had sold the negro girl Lise for \$500 or \$600. The judge did not err. The testimony does not go to make out a sale or transfer of a slave, or affect the title to one, but to prove the receipt of a sum of money by James Hacket, for property disposed of by him, and for which he must account.

In relation to the family proceedings had in 1832, and those under which all the property found in the estate of James Hacket was sold, it is clear, that the rights of the appellees to the separate property of their father remained unaffected by them. On

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neither occasion were they made parties to the proceedings, which were exclusively conducted on behalf, and for the use of the minors of the second marriage. But although the heirs of Francis Hacket are not bound by such proceedings, they have the undoubted right of ratifying the sale thus made of their property, and of claiming its proceeds. 2 Mart. N. S. 614. 5 Ib. N. S. 625. 2 La. 519.

The manner in which the Probate Judge has settled the rights and claims of the appellees, appears to us substantially correct: but he has, we think, improperly allowed them interest, at the rate of ten per cent per annum, from the maturity of the several instalments of the price their land sold for. The tutor is certainly accountable for whatever he receives for his minor, both capital and interest; but from the moment the funds reach his hands, he is not chargeable with more than five per cent per annum. Acts of 1825, p. 198. None of the children of the slave *Betsey* fell into the community, as contended by the appellant's counsel. From their ages as shown by the record, Lise, one of them, was born before the marriage of Francis Hacket, and the two others, *Arthemise* and *Nathan*, after his death.

It is therefore ordered, that the judgment of the Court of Probates be so amended, as to allow the appellees only five per cent per annum interest, instead of ten, on the sums, and from the periods, therein mentioned; and that it be affirmed in all other respects; the appellees to pay the costs of this appeal.

WILLIAM H. ROBERTSON and others v. FRANCISCO DE PAULO
DE LIZARDI and others.

Where the fact of a partnership is clearly shown, and that the bills of exchange sued on were drawn for the purpose of carrying on the business contemplated by the parties, plaintiffs will not be required to show, that they knew of the existence of the partnership when they took the bills.

Where for a limited period, and in relation to a particular branch of commerce, defendants were to buy and sell on joint account, and to participate in the profits, they become, as to third persons, partners in relation to that trade.

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There are cases in which the parties, though not partners *inter se*, will be held liable as such towards third persons.

APPEAL from the District Court of the First District, *Buchanan, J.*

This was an action by the plaintiffs, composing the firm of Robertson, Beale & Co. of Mobile, on two bills of exchange, amounting together to £1800 sterling, drawn by A. Mackenzie & Co. of that city upon the defendants, F. de Lizardi & Co., and protested for non-acceptance and non-payment. The bills were dated the 16th and 17th February, 1837. The petition alleges: That on the 17th August, 1836, the defendants gave a letter of credit to A. Mackenzie & Co., their correspondents, authorizing the latter to draw upon them to the extent of 12,000*l.* sterling, the credit to be extended under certain circumstances mentioned in the letter: That the said letter, contained in addition, propositions for the formation of a partnership between the defendants and A. Mackenzie & Co., during what is commonly termed the cotton season, of 1836—1837, which propositions were accepted by the latter, and became thereby obligatory on the defendants: That two other letters of defendants, dated Oct. 20th, 1836, and 2d March, 1837, confirm the first letter of 17th August, 1837: That the letter of 17th August, 1837, was shown to the petitioners, who, on the faith of it, purchased the two bills sued on, for which they gave 350 bales of cotton, which were subsequently sold by the defendants for the joint account of A. Mackenzie & Co., and themselves. Judgment is prayed for amount of the bills, with interest and costs, against the defendants, *in solido*.

The defendants, after a general denial, allege that the bills were taken upon the general credit of the drawers, and not on the faith of any letter of credit from them. They aver that if their letter of credit was ever communicated to the plaintiffs, the latter must have been aware, that A. Mackenzie & Co. had not, at the time the bills were taken, any authority to draw on them, or to make any shipments of cotton to them on joint account; that the bills were not drawn pursuant to the authority originally given; and that the limit of the credit had been, at the time, already greatly exceeded.

The letter of the 17th August, 1836, is in the following words :

" London, 17th August, 1836."

" Messrs. Alexander Mackenzie & Co.

" Gentlemen :—Having had the pleasure of becoming acquainted with your prior, and communicating freely with him our ideas respecting the great staple of your State and city, we have thought that by careful attention to the cotton business at both ends, that is, in Mobile in buying, and in Liverpool in selling, and keeping down the expenses in both places as much as possible, a fair business might be done. With the view therefore to the operations which we shall presently explain, we now enclose three letters of credit, one addressed to each of the three banks of Mobile, for the sum of four thousand pounds sterling, or twenty thousand dollars each.

It is understood that these credits are to be used exclusively :
First. For the purchase of cotton on our joint account and equal account with you. On such purchases it is understood and agreed upon, that no charge beyond actual disbursements is to be made, either for buying in Mobile, or for selling in Liverpool. Advice to be regularly given so soon as a purchase is made, and subsequently as to shipment, &c. ; and in all cases the cotton, while on shore, to be insured against fire, and timely notice given to us for the marine insurance.

Second. These credits may be employed as advances to parties disposed through your influence to consign to our house in Liverpool ; in which case we trust, that by examination as to quality, and a moderate scale of advances, little risk of heavy reclaims will be incurred ; and it is understood betwixt us that you are at liberty to take an interest of $\frac{1}{3}$ or $\frac{1}{2}$ in such shipments, and of your proportion we shall consider ourselves equally interested with you, although it be not so stated in the invoice, as we shall in such cases charge the usual commissions in Liverpool, and credit you with one-half of same.

Third. For these two objects the above credits are solely to be employed, and if an extension of them be required, please immediately to advise our friends in New Orleans; Messrs. M. De Lizardi & Co., who will open such further credits with such banks

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as you may name, and to such extent as the probable business may require. It has also been agreed upon betwixt us, and your prior, that we shall do what we can to influence orders for purchases of cotton, and also consignments of salt, coals, cotton-bagging, &c., to your house, and that the commissions accruing from these sources are to be set against those which we may derive from consignments through your influence: and the commissions on both sides, at the close of each year's business, are to be made up and ascertained, and the whole equally divided betwixt us and your house, so that the advantages may be equal and reciprocal.

This agreement to be in force for the present season; to be renewed hereafter, if mutually agreeable.

We say nothing, at present, as to prices or prospects, but shall endeavor to keep you advised of what is going on in Liverpool; and will thank you, in like manner, to give us regular advice of how matters are going on your side. It is understood that Mr. Berthoud shall not charge more than $\frac{1}{4}$ per cent, for accepting and paying your drafts, and negotiating on us, when that course is found most beneficial.

Most sincerely, gentlemen, yours,

F. DE LIZARDI & Co."

The letter of the 20th October, 1836, after expressing the conviction of the defendants that the price of cotton must be lower in a few months, from the derangement of the currency, and other causes, proceeds: "We should therefore recommend to you, if your market opens high, to be a looker on for some time, for by the month of February, March, or April, we have little doubt the accounts from hence will bring high prices on your side to a reasonable rate." In their letter of the 2d March, 1837, after stating that their anticipations, expressed in the letter of the 20th of October, preceding, had been more than realized, and declaring that the condition of the money market "must tend still further to reduce the price of all commodities, and cotton among the rest," they say: "We shall be thankful if your purchases, on joint account, are limited to those which you announce for Dalhousie Castle and John N. Gossler, together 746 bales, for we cannot hold out the hope to you of getting out of them, without a heavy

loss. We shall not wish during the present season to extend operations beyond the direct credits furnished your Mr. Mackenzie."

There is an admission in the record, "that one of the partners of A. Mackenzie & Co. being in New Orleans in the early part of the year 1837, applied to the firm of M. de Lizardi & Co. to obtain an extension of the credit of 12,000*l.* sterling, given to them on the Mobile banks, and that it was refused on the ground, "that the then state of business and commercial affairs, did not render such an extension advisable."

It was proved, that the defendants accepted drafts drawn by A. Mackenzie & Co. to an amount exceeding 16,000*l.* sterling.

There was judgment below in favor of the plaintiffs. The defendants are appellants.

L. C. Duncan, for the plaintiffs, contended that the defendants and A. Mackenzie & Co. were partners, and liable as such to plaintiffs, citing *McDonald v. Millaudon*, 5 La. 403. 5 Peters, 561. 3 Kent's Comm. 27. 3 Peters, 428. Gow on Partnership, p. 17, 176. Story on Partnership, chap. 4, sect. 64, p. 96.

Grymes, on the same side. The only question which this case presents, is, did a partnership exist between Mackenzie & Co. and the defendants, which would make both liable to third persons, for debts contracted within the sphere, and in relation to the business contemplated by the partnership?

The plaintiff holds the affirmative of this proposition.

In order to understand it fully, and make a just application of the principles of the law of partnership, we must ascertain with precision the facts of the case, as they are to be found in the record. The material facts lie in a very small compass.

The basis of the whole matter is the letter of the defendants to A. Mackenzie & Co., dated London, August 17th, 1836.

It establishes : 1st. That there was an agreement between the parties to buy and ship cotton at Mobile, which was to be sold in England. That this was to be done on joint account of both parties, and both were to share equally in the profits arising from the business.

2d. That the party in Mobile, was to procure consignments of

cotton to the party in England, to be sold on commission, in the profits of which they were equally to participate.

These two objects embrace the whole range, or extent of the ordinary business of a commission merchant, or cotton factor, in the southern ports of the United States.

3d. As a capital to commence these operations upon, a credit of 12,000*l.* is furnished upon three banks in Mobile, in equal sums.

The letter states that, "for these two objects, the above credits are solely to be employed. And if our extending them be required, please immediately to address our friends in New Orleans, Messrs. M. de Lizardi & Co., who will open further credits with such banks as you may name, and to such *extent as the probable business may require.*" The court must see, at once, that the terms of this letter are totally at war with the idea insisted upon by the defendants, that the whole business was to be limited to the original credit of 12,000*l.* It makes express provision to extend the business beyond that, and to an indefinite amount; "to such an *extent as the probable business may require.*"

To whose discretion was this left? Mobile was the place where the whole business was to have its commencement. Mackenzie & Co. alone could judge, or know any thing about the probable amount of the capital that might be wanted, or the extent of the business; and to them was left then among upon whom the credits should be furnished.

The most favorable construction of this letter for the defendants, could amount to no more than this: that it pointed to a *manner* of procuring the necessary funds to carry on the operations agreed upon; and it is submitted to the court, with great confidence, whether the *modus operandi*, or manner of raising the funds to accomplish the objects of the partnership, can in any manner affect the rights of third persons.

The drawing of bills of exchange is the usual, and, perhaps, the only mode by which funds can be raised for such purposes. The reason why they were sold out of doors, as it is called, in preference to selling them to the banks, is well explained by Brogden in his deposition. He says, the banks would give but seven per cent premium, and individuals out of doors paid ten. The court can-

not fail to see at once, the great advantage this was to the parties who were to share the profits, and the exercise of a most sound discretion on the part of the partner entrusted with the management of this part of the business ?

The plaintiffs confidently assume, that this evidence establishes an agreement between the parties to carry on the business of purchasing and shipping cotton in Mobile, and of making advances on the shipments of cotton to the defendants for sale on commission, for the mutual advantage of both, and in the profits of which both were to participate; and they submit to the court, that this, in law, constitutes a partnership which renders them, both, liable to creditors and third *persons*, upon all obligations contracted in the usual course of such business.

This position is no where contradicted by any competent, legal, or credible evidence to be found in the record. Every thing on the contrary, tends to strengthen and corroborate it.

The next letter, dated London, October 20th, 1836, contains nothing opposed to this. It is couched in language that would most naturally be used by one party to the other, whose interests were joint and common in the matters treated of.

The third letter, dated 2d March, 1837, still more strongly confirms the relative position of the parties as assumed by the plaintiffs. Its language is: "We shall be *thankful* if your purchases on joint account are limited, &c." No doubt is expressed of the right to extend the purchases further; no limit is laid down; no hint is given that there had been any specified limit fixed or agreed on; and no intention is expressed, or right asserted, to repudiate any operations beyond any specific limits.

One of the co-partners—and he to whom the discretion was necessarily left—does purchase and ship on joint account the cotton purchased with the proceeds of the bills of exchange in question.

It is not denied, and the whole evidence in the case proves it, that the bills were drawn, and the proceeds used in the purchase of cotton thus shipped; the very business contemplated by the partnership.

It is clearly proved that the defendants, who now pretend a limitation to the original credit of 12,000*l.*, did actually accept bills to the amount of 16,000*l.* and largely upwards; and we

never hear of any repudiation, on their part, until all the operations are ended—the last parcels of cotton shipped, the bills drawn, and then, in the face of a losing market, we hear, for the first time, of an intention to evade payment.

The plaintiffs insist, that it is only necessary for them to show the existence of a co-partnership; the business to which it related; that their claim is founded on a transaction within the usual scope of that business; and that no understanding between the parties as to limits, or the manner of doing the business, and known only to themselves, can in any way affect the plaintiffs' claim.

They confidently believe, that they have proved a partnership between the parties, embracing the most important branch of the mercantile business of this country, to the whole of its usual extent; in such a manner, as to fix their joint and several liability to all third parties, or creditors, whether they were *known* as partners at the time the obligation was contracted, or the debt created, or *not*; and whether the partnership was in the *capital stock*, or in the *profits*, or in *both*. See Story on Partnership, p. 74, sec. 49, p. 81, sec. 53, p. 82, sec. 54, 55, 56, 57, 58, 59, 60, 61. *Ib.* p. 155, sec. 103, and the authorities there cited. 3 Kent's Com. p. 23. The learned commentator, first referred to, has cited all the authorities that can be brought to bear on the subject. It would be a useless parade of research, here again, to cite and comment upon them. They have, however, been carefully referred to and examined, and will be found most fully to sustain his doctrine.

The same doctrine is very forcibly laid down by Mr. Justice Washington. He says: "The responsibility of one partner for the contracts of another, is not solely on the ground of the *credit being given to all*, which it is not, in the case of a *dormant partner*, but because, that being to share in the *profits*, he must share in the loss. 1 Wash. C. C. Rep. 492. 2 *Ib.* 388. The whole of the plaintiffs' case is embraced, and the principles applicable to it most ably laid down, by the late Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States in the case of *Winship v. The Bank of the United States*, 5 Peters' Rep. 352. And all the principles applicable to this case are con-

curred in by Mr. Justice Baldwin, the only one of the court, dissenting in some respects from the judgment rendered. This court, in the case of *McDonald v. Millaudon*, has reiterated and consecrated all these principles, referring to the case from Peters, sustaining its authority, and the soundness of its doctrine. 5 La. Rep. 403. The last cited case is a very strong one. I was engaged in it for the defendant, and the facts are familiar to me. There was no evidence from which to infer any knowledge, on the part of the plaintiff, of the connection between Millaudon and Flower, or that credit was given on that account. On the contrary, it was proved that the plaintiff's goods went into the hands of Flower before that connection existed in fact; and this court had already decided that, as between Millaudon and Flower, there was no partnership, to which decision it has since adhered. The case was, therefore, decided purely upon the principle of the liability of *secret or dormant partners* to third persons, when discovered, arising from their right to share in the profits. In addition to all which, the court is referred: 1st, to the charge of a very able New York judge to the jury, in a case against the same defendants, arising out of a transaction exactly like this, between the same parties, and upon the same evidence, in which there was a verdict and judgment for the plaintiffs. And 2d. to the judgment of the Supreme Court of the same State, affirming this partnership to have existed as charged by the plaintiffs in this case, and establishing the liability of the defendants as partners. *De Lizardi et al. v. Beers*, reported by Mr. Hill.

In summing up this case, we may then safely say; that all the authorities recognize the liability of *secret or dormant partners*, when discovered, to creditors.

But if, as the defendants contend, they must be known, and the credit given on the faith of their liability, it is obvious that the moment they are known, they are no longer secret or dormant partners; and if the defendants are right, such a case cannot exist, and all the learning in the books, on the subject, may as well be stricken out, and the world relieved from a mere delusion under which it has been long laboring, on the faith of judicial decisions and the labors of learned commentators.

The truth is, that all the difficulty in the case has arisen from

an error of the defendants' counsel in treating the subject as one of agency: the agent acting under known special instructions, within certain prescribed limits, and in a manner defined and laid down for his government.

Such a case we humbly conceive bears no resemblance to this.

There is no doubt, that the law of partnership involves, to a certain extent, the law of agency. Indeed, it is difficult to conceive any branch of the law that does not embrace certain things that are common to all.

That partners are, in some sense, mutual agents for each other is true. But the dividing, or diverging point, between mere agents, and partners having a joint interest in mercantile business, is easily perceived. The jurisprudence, and the universal understanding of the whole world, has fixed it.

The absurdity of confounding these two branches of law, throughout their whole extent, and to their ultimate results, is too obvious to need argument or illustration.

The responsibility of partners for each other, rests upon principles that have been long settled, for the common convenience and good of society. It is so stated and fully illustrated by the authors that have been quoted; and it is confidently hoped that they will not now be unsettled, or brought into doubt.

G. Strawbridge, for the appellants. The plaintiffs never saw the letter of credit of 17th August, till long after they had taken the bills. Passing over this part of the case, merely referring the court to the case of *The New Castle Manufacturing Company v. The Red River Rail Road Company*, 1 Robinson, 145, let us take the plaintiffs' own statement, that they saw the letter of the 17th August before they took the bills, and that they took them on the faith of that letter. Now, the relations of partners, as between themselves, are, like other contracts, regulated by their intentions. Pothier declares them to be reciprocal mandatories. Obligations, Cont. de Societ , 71 and 89. Story on Partnership, 261, &c. These duties and responsibilities are the same as those of agents. If A. and B. horse dealers, agree not to warrant, and A. sells with warranty, both are liable; but A. is responsible to B. for the breach of their agreement. Gow. Story, *ut supra*.

For the ease and security of trade it is held, that as regards

third persons, the responsibility of partners is not restrained by their private arrangements, as in the case of the horse dealers above stated ; and the reason given is, "*because the public cannot be conusant of their private arrangements ;*" from which it results, as a corollary, that where such third person has knowledge it does affect his contract ; and the same author is to that effect, p. 57, 65, 69, 164. See also Collyer, p. 243. 3 Kent, 27. 5 Pick. Rep. 11. 412. Indeed the principle is one of plain morality, running through all our laws. The taker of a negotiable note, with notice, loses all protection from its negotiable character. The person who deals with an agent, aware of his exceeding his authority—the purchaser or mortgagee aware of the existence of a mortgage not recorded—are all brought under the rule, and therefore they only stand in place of their *ayant-cause*, or he from whom they derive title.

I shall therefore examine the case, as though it were between McKenzie & Co. and De Lizardi & Co. Neither of these parties imagined they were forming a general partnership. If they are now found in such a position, it is from an erroneous opinion, not uncommon among mercantile men, that there is no partnership where none is expressed ; and who do not understand, that partnership is presumed by law as the result of certain acts, such as sharing profits. But this again, is a consequence deduced in favor of third persons dealing with them, without knowledge ; for, as between themselves, there may be an interest in profits without partnership. I lend A. \$1000, without interest, but he pays me in lieu half his profits ; but I share no loss.

Lastly, let us look at the case under the aspect it is supposed to have been presented, in New-York, in the case referred to by plaintiffs' counsel, and in its least technical and most liberal and equitable view. The learned Judge who decided that case, found that beyond the clause in the letter of 17th August giving the credit of 12,000*l.* there was a general power to draw to any amount, and this conclusion is mainly based upon the concluding clause of that letter. It is understood that, "*Mr. Berthoud shall not charge more than one-half per cent. for accepting and paying your drafts and negotiating on us when that course is found most beneficial.*"* Who is Mr. Berthoud ? Where does he live ?

What were his relations to the parties? What was his authority or what his instructions to accept and pay? To what amount, or why was he to do it at all?

For any thing we can gather from the record before us, we are in the dark, and it seems to me if the learned Judge had no more information than it presents, the plaintiffs were very deficient in their proof, about a very important matter which it was their duty to explain. But let us put it on the most favorable footing for them. Let us suppose that Mr. Berthoud was a merchant residing at New York, a correspondent of the defendants, perhaps an agent. It was within the power of the plaintiffs to have obtained his testimony—to have made him produce his correspondence with and instructions from Lizardi; and they have no right to ask the court to eke out testimony they did not make an effort to procure. The presumption is, that the testimony was against them. But what does it amount to? The plain language of the clause is this: If you find it more beneficial to draw on New York—if the rate of exchange is higher or demand greater, do so—and Mr. B. will accept your drafts and reimburse himself by drawing on us, for which he will charge no more than one-half per cent.

Here is no new authority for an extended credit. Any extension was to be obtained through the New Orleans house. It is plainly another mode of using the first credit. *If you find it more beneficial.* More beneficial than what? More beneficial than drawing through the Mobile banks. To what amount? Certainly the same it was substituted for. How can we reconcile a credit for 12,000*l.* on a bank with right to draw on another bank or individual, "if more beneficial," with the latter's being for an unlimited amount. Our Code, art. 1954, providing for the interpretation of contracts, declares: "However general be the terms in which a contract is couched, it extends only to the things concerning which the parties intended to contract." The parties were here speaking of the credit of 12,000*l.* This, and its renewals, were the means designated for their operation; the drafts through Berthoud, an alternative mode of using the same means.

BULLARD, J.* A re-hearing was allowed in this case, and we

* MORPHY, J., having been of counsel in this case, did not sit on its trial.

have attentively and deliberately considered the arguments adduced by the parties.

The controversy appears to us to turn upon the question; whether the partnership between McKenzie & Co. and the defendants, as evidenced by the letter of the latter of the 17th of August, 1836, still existed at the date of the bill of exchange, and whether they were drawn in relation to the business of the partnership: for we cannot doubt that a partnership did exist between the parties, in the cotton trade between Mobile and England, in which the parties were to divide the profits; but whether it ceased as soon as the fund provided, through the Mobile banks, was exhausted, and the house of M. De Lizardi & Co. of New Orleans declined furnishing any further credits, forms the main question in this cause.

The whole of the letter must be taken together. After explaining the nature of the trade in which they are about to embark, on joint account, and stating that letters of credit to the Mobile banks are enclosed, to the extent of twelve thousand pounds sterling, they say: "For these two objects the above credits are solely to be employed, and if our extension of them be required, please immediately to address our friends in New Orleans, Messrs. M. De Lizardi & Co., who will open further credits with such banks as you may name, and to such an extent as the probable business may require."

This shows, that the defendants did not contemplate a limitation of the capital to be advanced by them in the business, at the twelve thousand pounds. Nor does it appear that they intended it should depend upon the will of M. De Lizardi & Co., to put an end to the concern, by declining to open further credits. And what was the *probable business* to which the defendants allude, and which was to form the limit of the new credit? It was the cotton business, during the season, the purchase in Mobile, and the sale in England, for joint account. Suppose the defendants, instead of referring to their friends in New Orleans to open further credits, had directed McKenzie & Co. to write to them, and that they would open further credits, commensurate with the probable business undertaken by them, it would have been a promise to permit such further credits, instead of a limitation to the sums

already advanced. This view of the matter is greatly corroborated by another clause in the letter, which escaped our notice on the first argument of this cause. It is towards the close, in which they say: "It is understood that Mr. Berthoud will not charge more than one-half per cent. for accepting and paying your drafts, and negotiations on us, when that course is found most beneficial." Now, it is asked, who is Mr. Berthoud? To this it may be answered, that the record does not inform us: but he was, certainly, a person indicated by De Lizardi & Co. as willing to facilitate the negotiation of bills, for the joint benefit of the parties, and that McKenzie & Co. were at liberty to resort to that means of raising money, if they found it most advantageous. This repels the idea of a limitation as to amount, as stated in the letters of credit addressed to the banks in Mobile; because, it left it to the judgment of McKenzie & Co. to draw through Berthoud, or to apply to M. De Lizardi & Co. for further credits.

But the letter says in express terms: "This agreement to be in force for the present season, to be renewed hereafter, if mutually agreeable." Now, the agreement related to the purchase and sale of cotton, on joint account; and the mutual or reciprocal recommendations of consignments, in the commissions upon which, the parties were to participate.

It would appear also, from the correspondence between the parties, that the defendants did not consider the authority of McKenzie & Co. to purchase on joint account, as limited, originally, to the sum of twelve thousand pounds. In a letter of the 2d of March, 1837, they speak of the great derangement in the money market, of the want of confidence, and of the danger of further depression in the price of all commodities, and cotton among the rest; and they say: "*We shall be thankful* if your purchases on joint account are limited to those which you announce as per Dalhousie Castle, and John R. Gosslin, together, 746 bales, as we cannot hold out the hope to you of our getting out of them without a heavy loss; although you may rely, that every exertion to this effect will be made." They add: "We shall not wish, during the present season, to extend operations beyond the direct credit forwarded your Mr. McKenzie, &c."

The bills of exchange on which this action is brought, had al-

ready been drawn at the date of this letter. It is further shown that cotton, to the amount of more than the twelve thousand pounds, was sold by the defendants on joint account; although the cotton, purchased with the proceeds of the bills in question, was, in point of fact, sold for the particular account of McKenzie & Co.

The fact of a partnership being clearly shown, and that the bills were drawn for the purpose of carrying on the business contemplated by the parties, it does not appear to us, necessary for the plaintiffs to show that they knew of the existence of the partnership, at the time they took the bills; and the circumstance, that the letter of the 17th of August was not communicated to the plaintiffs, until after the bills were drawn, does not appear to us material. The parties certainly contemplated a participation in the profits of the cotton trade during the season, and that is sufficient to constitute them partners, as to third persons dealing with them, or either of them, in relation to that branch of trade. Story on Partnership, sect. 55, 103. 3 Kent's Commentaries, (1st edition,) page 17.

It is, however, contended by the counsel for the defendants, that the parties never contemplated a general partnership; and he infers this from their having assumed no social name, from there being no capital provided, no partnership books opened, no provision made for expenses, and because no such thing is named in their correspondence. Let it be admitted that all this is true, and that there was not, between the defendants and McKenzie & Co., a regular, formal, and general partnership; yet the moment it is shown that, for a limited period, and in relation to a particular branch of commerce, they were to buy and sell on joint account, and participate in the profits, they became thereby, as to third persons, partners in relation to that trade. There may be cases in which, in point of fact, the parties are not partners *inter se*; and yet, are held liable, as such, towards third persons dealing with one of them. This was the doctrine recognized by this court in the case of *McDonald v. Millaudon*, 5 La. 409.

In that case, Millaudon was to receive a portion of the profits in the concern of Flower & Co., in the shape of interest over and above ten per cent, upon an advance of money to the firm. As

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between themselves, Flower and Millaudon were not partners ; but the latter was held liable towards third persons. 5 Peters, 561.

In the case now before the court, McKenzie & Co., and the defendants, in the settlement of the concern, admit, that upwards of sixteen thousand pounds sterling were employed in their joint operations ; the whole of which was raised by bills of exchange drawn on the authority of the letter of the 17th of August, 1836. The bills in question were drawn in the course of the same trade : and before any intimation had been given, that De Lizardi & Co. were not inclined to extend the business on joint account, beyond the amount of the original credit. Notwithstanding our first impressions, we are now satisfied, that, although that letter was not communicated to the plaintiffs when the bills were drawn, so as to bind the defendants to an acceptance of those particular bills, or to amount to an acceptance beforehand ; yet the partnership being shown, and the transaction being in relation thereto, the defendants are liable.

Judgment affirmed.

JOHN PHILLIPI v. ASA D. GOVE.

The seller is bound to explain himself clearly respecting the extent of his obligations ; and any obscure or ambiguous clause will be construed against him. C. C. 2449. The exhibition of a sample on the sale of merchandize, is an indirect and tacit representation of the quality of the article ; and unless the warranty is clearly and explicitly excepted by the vendor, he must deliver the article in a condition equal to that of the sample.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Gedge, for the appellant.

Grymes, for the defendant.

SIMON, J. The plaintiff sues to recover the amount of an account for three hundred kegs of grapes, and one hundred drums

of figs, sold to the defendant at public auction. Only forty-two kegs of grapes were delivered to the defendant, who refused to accept the balance, and resists the claim of the plaintiff, on the ground, that he is not liable for the value of the grapes, inasmuch as he was induced to purchase them through fraud and misrepresentation; the articles tendered to him being greatly inferior to those exhibited publicly, as samples of the whole lot.

There was judgment below in favor of the plaintiff, only for the price of the figs, and the value of the empty kegs received by the defendant; from which judgment, the plaintiff appealed.

The evidence shows that the articles in question were sold to the defendant, at public auction, on the levee, opposite the vessel in which they were; and that the principal part of the cargo remained on board the brig. At the time of the sale, there were ten or twelve kegs on the levee, and the auctioneer told the bystanders to open any of them to see what they were. The heads of one or two of the kegs were knocked in. They were opened promiscuously, and looked very well. Questions were addressed to the auctioneer by a bystander, inquiring whether the grapes were guaranteed to be like the sample opened, to which he answered, no. This was said in French; and *in announcing the sale, the auctioneer did not announce that the grapes were not guaranteed.* The ten or twelve kegs were landed *as samples to sell them*, the balance to be delivered from on board. When the auctioneer commenced the sale, he announced the terms of sale from a paper which he had in his hand, (this paper having been produced, shows only the terms of payment,) and after the keg was opened, he said: "Here is one keg promiscuously opened, and you see how it turns out." The defendant purchased three hundred kegs, at the rate of \$2 per keg.

Several witnesses have been examined, some of whom were present at the sale; and they generally concur in saying, that in the purchase of grapes, it is expected that the cargo will turn out equal to the sample; or, in other words, that the bulk will be equal to the sample. One of them says, that having purchased twenty-five kegs, he opened ten of them, and found them nothing like the sample. The appearance of the sample exhibited to him,

induced him to purchase them. Another swears that the quality of the samples was very good, that he opened the keg spoken of by the other witnesses ; and \$2 a keg was the fair market price for good grapes, at that time. Another testifies, that on examination of the forty kegs brought to defendant's store, they turned out to contain saw dust and grape stems ; and the last witness says, that he purchased a lot of grapes the same season, and only a part turned out equal to the sample ; the balance was returned to the seller, who took it back. He adds, that he never considered it a sale unless the bulk turned out equal, or nearly so, to the sample ; and that the exhibition of the sample, is a warranty that the balance is equal to it.

With this evidence before us, it is unnecessary to inquire into the question raised by the bill of exceptions contained in the record. The object of the testimony sought to be introduced, and which was rejected, was to show that the grapes in question were, at the time of the auction sale, announced by the auctioneer to be sold without any warranty. On referring to his evidence, we find that he states positively, that "in announcing the sale of the grapes, he did not announce that they were not guarantied." What was said by him in relation to the warranty, was only in answer to a question made to him by one of the bystanders ; and it has not been shown that, although the auctioneer's answer may have been heard by some of the persons present, the defendant, who, perhaps, did not understand the French language, heard and understood what was said between the witness and the auctioneer. From the view we have taken of the merits of this case, we do not think that the evidence offered and rejected, would, if admitted, change in any manner the final determination of the cause ; as, in our opinion, the right of the plaintiff to recover, depends mainly upon the circumstances disclosed by the evidence, in relation to the samples which were landed, and exhibited for the purpose, as the auctioneer says, of selling the grapes.

We concur with the judge, *a quo*, in the opinion, that this is a sale by sample, to the extent that *the bulk of the article should be generally as good as the sample exhibited*. Were it otherwise, it would enable the vendor to practice the most flagrant and gross frauds ; and the purchasers would easily be imposed upon, with

out the law affording them any protection, or any remedy against it. Now, what was, in this case, the real agreement or understanding of the parties? On the one hand, good samples are exhibited, and are examined by the bystanders with the undoubted expectation that the bulk shall correspond with the sample; and as one of the witnesses says, the appearance of the sample is what induces the persons present to buy. Instead of finding the article in the same condition, it turns out to be entirely bad, and only fit to be thrown away. On the other hand, it is pretended that the sale was made without warranty, and that, therefore, the plaintiff was, forsooth, fully authorized to deliver saw-dust and grape stems, in lieu of merchantable grapes according to the sample. The auctioneer did not say that he sold without warranty; but to this it is answered, that he did not announce that the article should be warranted. He must have then exhibited the sample as a lure to the bystanders; as the plaintiff pretends that this implies no warranty, and that the purchasers must necessarily have expected that the bulk would not resemble the sample. This seems to us unreasonable, and cannot be countenanced. It is a principle of law, that the seller is bound to explain himself clearly respecting the extent of his obligations, (Civil Code, art. 2449;) and that any obscure or ambiguous clause is to be construed against him. The exhibition of the sample implies a warranty that the article shall be in some measure in conformity to it; and it was the duty of the plaintiff, through his agent, to have explained himself clearly as to the extent of the warranty. The grapes were sold at the fair market price for good grapes at that time; and delivering to the purchaser saw dust and grape stems, amounts in our opinion, to a fraud sufficient to invalidate the contract. Civil Code, art. 1841. We consider, therefore, that the exhibition of the sample is an indirect and tacit representation of the quality of the merchandize, and that, except where the warranty is clearly and explicitly excepted by the vendor, he must deliver the article in a condition equal to that of the sample. We are not ready to say that, in any case, even in one in which warranty has been specially and clearly excepted, the vendor should ever be allowed to recover the price of objects by him sold in a state of

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complete destruction or non-existence, for this would amount to a non-delivery, or be the result of a fraud.

Much has been said to show the usage of trade in relation to this particular article ; but we think the plaintiff has failed to establish it. The evidence on this point is contradictory, and we cannot believe that any commercial usage would ever authorize the plaintiff to sell and claim the price of merchandize which, having been destroyed at the time of the sale, and not existing, cannot be delivered,

Judgment affirmed.

HENRY MERRITT v. CHARLES F. HOZEY, late Sheriff, and others.

No appeal will lie from an action instituted against several defendants on an instrument by which they are bound severally, as sureties, for a fixed sum, where the amount claimed from each is under three hundred dollars, though the whole claim exceed that sum. The defendants cannot give jurisdiction by joining in one appeal, where they would have no right to be heard separately.

APPEALS from the Parish Court of New Orleans, *Maurian, J. Vason*, for the plaintiff.

Lockett and Micou, for the appellants.

GARLAND, J. This suit is brought to recover from the late Sheriff of the Parish of Orleans, and his sureties, \$600 with interest and costs. There are eight sureties on the bond, all of whom are joined in this action, each of them being severally bound for a fixed sum ; and judgment is prayed for against the principal for the whole amount, and against each of the sureties, for such amounts as will be in proportion to the respective sums for which each has bound himself in the bond. Judgment was rendered against four of the sureties, each for the sum of \$93 33 $\frac{1}{4}$ with interest ; and against four others, each for the sum of \$81 66 $\frac{3}{4}$, with interest. From this judgment or judgments, (they are all in one,) four of the sureties appealed in one petition, and gave bond and security in the sum of \$1,000, for which they are jointly bound, and the surety bound generally for all. L. L. Ferriere,

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another surety, took a separate appeal, and gave bond for \$120; and Walton also appealed by a separate petition, and gave bond for \$1000.

The appellee moves to dismiss the appeal, for want of jurisdiction, as the amount claimed of each surety, does not exceed three hundred dollars.

We are of opinion that the appeals must be dismissed. The sum claimed of each of the defendants is less than \$300; and they cannot, by joining in one appeal, give the court jurisdiction, when they have separately no right to be heard. In 5 Mart. N. S. 87, the court said: "The attempt made by this mode of proceeding to obtain a review of these judgments, and to have their nullity established, is an attempt to have that done indirectly, which the law will not permit to be done directly. We are of opinion that we cannot, in this way, take cognizance of cases of which the constitution and the law have denied us jurisdiction."

The appellants contend, that as the plaintiff has joined them in the same suit, he has himself made a case, which authorizes them to appeal. We are of a different opinion. If a separate suit had been instituted against each appellant, claiming only the sum of \$93½, it is very clear no one of them would have been entitled to an appeal; and we do not see that the joining of them in one suit makes any difference as to their rights. If they thought their rights endangered by being all joined in the same suit, the appellants ought to have objected in the inferior court, and not have reserved their objections for this tribunal.

*Appeals dismissed.**

**Micou*, for a re-hearing: The case cited by the court from 5 Mart. N. S. 87, differs *toto calo* from this case. In the case cited there were three distinct claims of three different *plaintiffs* on *separate* contracts, and having *separate* judgments in separate suits. There was no point of union between them, except that the defendant in all was the same.

In the case now before the court, the sum demanded by the plaintiff is a single sum of \$600. His claim grows out of a single default of the Sheriff, and he seeks indemnity from the defendants, in the *same suit*, by reason of their having signed the *same bond*.

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Is not this a civil cause? Does not the amount involved exceed \$300? If so, this court must entertain the appeal.

Where the sum demanded is over the amount fixed in the constitution, we believe it has never been held, to be below the jurisdiction of the court, if claimed in the same right, and upon the same contract, although there may have been several defendants. Even where two distinct demands, against different defendants, were consolidated by consent, the appeal was allowed. *Baillio v. Prudhomme*, 8 Mart. N. S. 338.

If a suit was brought upon a promissory note for \$600 given by A. B. deceased, against his heirs, eight in number, who have accepted the succession and enjoy it equally, would the court dismiss their appeal because in paying, each heir would have to contribute less than \$300?

If, on the other hand, in the case supposed, the judgment were for the defendants, would the court refuse to the plaintiff the right of appeal?

And if the plaintiff in such suit could appeal, would the right be refused to the defendants? And so in the case of particular partnerships, and joint contracts in general.

We believe the test of the right of appeal is not, how many defendants, or how many plaintiffs, there are in a cause, but whether the *amount in dispute*, claimed in the same right, exceeds the sum fixed by the constitution.

Suppose six heirs inherit a note of \$600, and bring suit upon it. They in effect claim \$100 each. It cannot be maintained that the right of appeal would not exist.

But the decision of the court is based upon the assumption, that no more than the proportionate share of each surety was demanded of each of these defendants, and that the judgment was rendered against each for a distinct amount.

Now it is perfectly well settled, that the right of appeal results, not from the amount of the judgment, but the amount of the claim; so that we may lay aside any further reference to the judgment.

The petition alleges, that the defendants all became sureties in the same bond, though each for a separate amount, and that their liability is in proportion to the amounts by them subscribed.

Judgment is demanded against them jointly, and in proportion &c., and there is a prayer of general relief.

Now suppose the Judge of the court below had condemned each of these sureties to pay the whole debt, would this court have reversed its judgment, being satisfied that the case was one in which the responsibility of sureties had attached?

To answer this question, we would not presume to refer to higher authority than the bench which has pronounced this decision.

The *charge of liability* and the *prayer for relief* in the two cases of *E. Gardere* against the same sureties, (2 Robinson, 568, 570,) and of *Dougherty* and another against the same sureties, (2 Ib. 534,) were *verbatim* the same; and

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this court first decreed that the sureties were liable upon *that bond* and in *that form of suit, in solido*; and after a petition for re-hearing, that they were liable, *severally*, each for the *whole* amount of the plaintiff's claim.

The court cannot have forgotten how assiduously the counsel labored to induce the court to render a joint judgment, or a judgment against *each for his share*, but without success; and the decree was finally rendered in all of the three cases named against each surety for the whole amount.

It would be, to say the least of it, very unfortunate, if this is to be the rule operating against us in large cases, and we are to be deprived of its benefit in small ones.

The suit of Gardere against Hozey's sureties, was the first one instituted in the courts below. The liability was there alleged to be *joint* and *in proportion* &c., and the prayer was to the same effect.

This was adopted as the model of all the suits instituted upon the sheriff's bond, except the single case of Corlis in the District Court.

The records in the cases of Hall and others, (2 Robinson, 479,) Merchants Bank of New Orleans, (2 Ib. 214,) Peckslay, (2 Ib. 479,) Johnson and another, (2 Ib. 555,) and it is believed of Seip, (2 Ib. 567,) all against the same defendants, will show the same allegations and prayer.

In fact, the counsel were doubtful what was the nature of the responsibility, and in alleging it to be joint, and praying for general relief, they intended to leave it to the court to decide how the sureties were liable, and expected a judgment in conformity with the opinion of the court, whatever that might be.

The court has decided in the case of *Leverich v. Waldon*, where the petition claimed 5 per cent, that a judgment for 10 per cent interest, would be sustained under the prayer for general relief.

The prayer in this case was for judgment against the sureties in *proportion to their respective liability*. If the court be of opinion, that the liability of each is for the whole claim, is it not obvious that a judgment against each for the whole, is a judgment in *proportion to their respective liability*? If there was any doubt of this, can there be a doubt that the court would be competent to render such judgment, under the prayer for general relief? The plaintiff did not intend to release the defendants from any portion of their liability, but prayed judgment of the court, how far that liability extended.

The court must necessarily perceive from the record, that this suit is for a default of the sheriff, after the appellants had ceased to be his sureties, and consequently, that they have been condemned to pay a sum of money, which they do not owe. If any new and more limited restrictions upon the right of appeal are to be imposed, it is respectfully submitted that they should be introduced in cases, in which the rights of the parties were, at least, doubtful; and that justice and the decisions of this court in other cases, require a review of the present decision.

Re-hearing refused.

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**PIERRE ESCURIEUX v. CAROLINE CHAPDUC and another, Heirs
of Alexandre Chapduc, deceased.**

In the absence of proof to the contrary, it will be presumed that the judgment of an inferior court was rendered on the necessary evidence ; but where the record itself shows that a judgment by default could not have been rendered on such evidence as the law requires to make it final, the case will be remanded.

Where on an appeal from a judgment by default confirmed below, the clerk certifies the record as containing a true copy of *all the documents on file* and proceedings had, but does not show that any other document, which may have been produced, was not filed, and it appears from the transcript that without producing another document the judgment could not have been legally confirmed, the judgment must be set aside. *Per Curiam*. If no other document was produced, the evidence was insufficient ; if produced, it was the plaintiff's duty to have placed it on file. C. P. 585.

APPEAL from the Court of Probates of St. James, *Nicholls*, District Judge presiding, the Judge of the Court of Probates having recused himself.

Winchester, for the plaintiff, moved to dismiss the appeal, on the ground that the court cannot take cognizance thereof :

1. Because of the want of all evidence in the record to show, that service of petition and citation of appeal was made on the appellee. 7 La. 361. 10 La. 399.

2. Because no citation of appeal has been returned with the record, showing any service on the appellee, 10 La. 484.

3. Because the record does not exhibit any statement of facts, nor bill of exceptions ; nor does it contain *all* the evidence on which the case was adjudged in the court below ; for, the certificate of the clerk shows that the testimony taken in open court, *was not* reduced to writing. *Bowman v. Junes*, 6 La. 124. Same vol. 303.

Bodin, for the appellants.

SIMON, J. The defendants are appellants from a judgment by default taken and made final against them, in which it is stated that the same was rendered after the plaintiff *had proved, by legal evidence, all the allegations contained in his petition*. The record does not exhibit any statement of facts, or bill of exceptions ; and the clerk certifies that it is a true copy of *all the documents*

on file, and all the proceedings had in the suit, the parol evidence not being reduced to writing on the trial of the case.

The plaintiff's claim is founded on the following allegations : That in the year 1832, an execution having been issued against his property, the same was levied upon his female slave and child, by Ceresay, late Sheriff of the parish of St. James. That being desirous of retaining the possession of the slaves seized, he obtained the consent of the Sheriff thereto, on depositing in his hands as collateral security a note of \$1200, drawn by him, the plaintiff, to the order of, and endorsed by one Jean Cabanne ; dated the 14th of February 1833. That the slaves seized were subsequently sold by the Sheriff, and delivered to the purchaser, whereby he, plaintiff, became entitled to demand from the Sheriff the return of the note. That, in the mean while, the Sheriff having died, the note passed into the hands of his universal legatee, Alexandre Chapduc. That the note was secured by mortgage on certain property ; and, that afterwards, to wit, on the 23d of April 1832, the plaintiff having sold the property mortgaged to two individuals, (Roussel and Gaudet,) the payment of the note was assumed by the purchasers, who bound themselves to pay the amount thereof to Cabanne. That the petitioner paid Cabanne the amount of the note and took it up, and became thereby entitled to recover the amount from the purchasers, in virtue of the act of sale ; but that Alexandre Chapduc collected its proceeds by means of a suit brought against the purchasers, by virtue of the assumption contained in the act of sale. He further states that A. Chapduc, in his lifetime, frequently promised to pay him the amount thus received by him from the purchasers, as the same justly belongs to the petitioner, who now claims it from the present defendants, as heirs of the said Alexandre Chapduc deceased.

No answer was filed by the defendants, although they first appeared by filing a dilatory exception, which was subsequently waived ; and the plaintiff was bound to make out his case, and establish his allegations before the court, in order to confirm and make final the judgment by default taken against the defendants.

The only document found in the record, filed six months previous to the rendition of the judgment complained of, is a copy of

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the act of the sale from the plaintiff to Roussel and Gaudet, who, as purchasers of the property mortgaged, had assumed to pay the amount of the note alluded to in the plaintiff's petition.

The appellants have assigned errors apparent on the face of the record ; and contend, that the judgment appealed from was not rendered after legal proof of the plaintiff's allegations, but was pronounced on insufficient evidence : that on the face of the petition itself, judgment could not be given against the defendants ; and that the transcript shows that no other evidence was produced by the plaintiff, but the copy of the act of sale found in the record ; whilst, in order to prove *all* the allegations of his petition, it was absolutely necessary for him to introduce in evidence the record of the suit alleged to have been brought by A. Chapduc, against the purchasers, who had assumed to pay the note of \$1200.

It is true, as a general rule, that in the absence of proof to the contrary, we are bound to presume that the judgment below was rendered on the necessary evidence, which the law requires to make it legal and correct ; and that mere suggestions, that the allegations in the petition were not, or could not have been proved, will not destroy the presumption that the lower court rendered its judgment on evidence which authorized it. But in this case, it appears to us, that the transcript itself shows, that the judgment appealed from could not have been rendered on such evidence as was legally required to make the judgment by default final, unless the documentary evidence was withdrawn by the plaintiff *without being filed*, after it was produced. The clerk certifies, that the record is a true copy of *all the documents on file*, and proceedings had in the suit, and that the parol evidence was not reduced to writing. His certificate does not show that any of the other documents, which may have been produced by the plaintiff, were not put on file, and only accounts for the absence of the parol evidence. Now, from the nature of the suit, and from the allegations of the petition, it is clear that, if the judgment appealed from was based only on the sole document found in the record, and on the parol proof which was not reduced to writing, the evidence was insufficient ; and on the other hand, if the plaintiff did really produce other written evidence, it was his duty to file it, so that it might have been included and copied in the record, in case of

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an appeal, Code of Practice, art. 585. In both cases, the appellants must be relieved; particularly as the petition itself exhibits such contradictions, and inconsistencies, as could not perhaps have been supported by any evidence concordant with the plaintiff's allegations.

Under all the peculiar circumstances of the case, we think that justice requires it should be remanded for further investigation.

It is therefore ordered, that the judgment of the Court of Probates be annulled, and that this suit be remanded to the court, *a qua*, for a new trial; the costs of the appeal to be borne by the plaintiff and appellee.

SAME CASE—APPLICATION FOR A RE-HEARING.

Where by the consent of counsel, an order has been entered, remanding the record for the purpose of being perfected, coupled with an agreement that the whole case shall be submitted on written arguments, within a certain time, the appellee will be considered as having renounced any right to move for a dismissal of the appeal on the ground of want of citation.

Winchester, prayed for a re-hearing.

SIMON, J. The appellee's counsel, in his application for a re-hearing, complains of our having overlooked his plea to our jurisdiction, and which, he says, he had a right to expect, would have been examined and adjudicated upon, before an examination was made into the record.

We were aware of the appellee's motion to dismiss the appeal, and of the exception by him filed to that effect. Indeed, our first impression was that his motion should prevail, as it did not appear that he had been cited; but on being referred to the minutes of this court, we found the following order, regularly entered on the 23d of January, 1843, before the filing of the appellee's exception: "On motion of A. Bodin, Esq., counsel for appellants, and with the consent of Benjamin Winchester, of counsel for appellees, it is ordered, that the record, in this case be sent back to the clerk of the inferior court, for the purpose of being perfected and com-

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pleted; *the whole case to be submitted on briefs, within fifteen days after it is filed again in this court.*" We were of opinion that the appellee's consent to the perfection of the record, and to the whole case being submitted on briefs, was such an appearance on his part as amounted to a waiver of the exception, and to an absolute renunciation of the right of moving for the dismissal of the appeal. Nay, we consider the order as a positive consent that the case should be tried on its merits, and as the appellant had not filed any point against the motion, we thought it was understood in the same way by the parties, and that it was unnecessary to notice it in our first opinion.

We still adhere to the same opinion. It is clear that if the appellee had intended to rely upon the want of citation, he should have abstained from appearing in the case, and from giving his consent to the completion of the record, and to the whole case's being submitted on briefs. This consent is inconsistent with the motion of an appellee who, not having been cited, only appears to inform the court that the case is not in a condition to be tried, for want of proper parties; and we cannot view the order referred to in any other light than as a waiver of the exception; or, in other words, as an appearance on the part of the appellee, equal to that resulting from a regular citation of appeal.

On the merits, we still think that the case was properly remanded for a new trial; as from the pleadings, and the evidence adduced by the plaintiff, so far as it is shown by the record, and supposing that further proof was adduced by him to establish his demand, the judgment appealed from, confirmatory of the judgment by default taken by the plaintiff, does not appear to us to be supported by such legal and satisfactory evidence as, from the allegations of the petition, the plaintiff was bound to produce, to make it final. We feel convinced that, as the case stands, our affirming the judgment, would amount to a denial of justice.

Re-hearing refused.

Erwin v. Walton and another.

JAMES ERWIN v. JAMES B. WALTON and another.

APPEAL from the Commercial Court of New Orleans, *Watts*,
J.

Wharton, for the appellant.

Lockett and Micou, for the defendants.

SIMON, J. An order of seizure and sale having been obtained against the defendants upon an act of sale and hypothecation, importing a confession of judgment, they moved for a rule upon the plaintiff, to show cause why the order should not be set aside and annulled, on the grounds : 1st. That the writ was issued, *without any authentic evidence* having been adduced. 2d. That in the act of sale, plaintiff contracted to leave in the hands of the notary, some of the notes given by defendants as a security against a mortgage therein recited, *which he has failed to do*. 3d. That the plaintiff *has not raised that mortgage*, nor provided against it the indemnity required by said act, and is not entitled to recover the whole price until he shall have done so.

The rule applied for was granted, and subsequently made absolute ; and the plaintiff has appealed.

The clause of the act relied on by the opponents, is in these words : " Upon which property there exists a special mortgage in favor of John M'Donough, to the amount of \$46,100, as assumed, and which the said vendor hereby obligates himself to remove ; but to secure the aforesaid purchasers from all loss and damage which might arise to them in consequence of the aforesaid incumbrance, *the said vendor leaves in the hands of the aforesaid notary, as a special deposit, promissory notes of the said purchasers, and others, of the aforesaid square of ground, to double the amount of said incumbrance*, until the same shall be removed and cancelled ; or should the vendor wish to take possession of said notes at an earlier period, he hereby obligates himself to remove the aforesaid incumbrance, or to make a special deposit in cash, in one of the banks of this city, to the full amount thereof, and obtain a certificate to that effect, which, being lodged with the notary, the last \$100,000 of notes of the purchase money thus lodged in deposit,

can be removed by the vendor out of the hands of the said notary."

Now, on the first ground of opposition, it seems to us that the defendants must fail. The act on which the executory process complained of was granted, is an authentic one. It was passed before a notary public, in the presence of two witnesses, and the debtor acknowledges therein, the debt for which the special mortgage is reserved and given. As such, it imports a confession of judgment. Code of Practice, art. 733.

On the second ground, we think the opponents are not entitled to relief. No evidence has been adduced to show that the notes alluded to in the act were not deposited with the notary, or that, after having been left in his possession, they were withdrawn by the vendor. The act itself, shows that the notes, to the amount agreed on, were left with the notary; the expressions used in it are in the present tense; that, "*the vendor leaves,*" &c. &c., and are followed by the provision that, "*should the vendor wish to take possession of said notes, &c.*" This implies that when the act was signed, the notes were not in the vendor's possession, but in that of the notary; and we cannot presume that the parties would have signed the act, if the conditions, or provisions therein contained, and which are stated therein as being fulfilled at the same time with the act, had not been strictly complied with. The act speaks for itself, and proves the stipulations therein mentioned; and it was the duty of the opponents to establish the fact, that, although it shows on its face that the notes in question were *then* left with the notary as a special deposit, the vendor failed to comply with this condition.

It has been urged, however, that the circumstance of the seizure and sale's being obtained on the last note, shows that they were not deposited with the notary, and that it ought to be presumed that the first five notes were paid. The sale under consideration, was made for the sum of \$6,100, payable in six instalments, and six notes were given for the price, the last of which only became due five years after the sale. The amount of the mortgage to be secured, was \$46,100, and the security is stipulated to be *for double its amount*; thus being nearly for \$100,000. Some of the purchasers' promissory notes, and not all, are stated

in the act to have been, *with others*, put in the hands of the notary; and we see no reason why we should say, that the note sued on is one of these deposited. If the five other notes were paid, it was in the power of the opponents to produce them, and until their payment or production, we must presume that those five notes are yet, *with others*, in the possession of the notary, according to the terms of the act of sale. If the five first notes were, as we are induced to infer from the act itself, left with the notary at the time of the sale, so as to form the amount of the security given by the vendor, to wit, \$100,000, this could not prevent the vendor from exercising his rights upon the note sued on, as the vendees, sufficiently secured against the effect of M'Donough's mortgage, could have no valid objection to paying the price of the purchase.

The third ground is also untenable. Nothing shows that the notes were ever withdrawn from the possession of the notary, and that the vendor was bound to make *a special deposit in cash*, as provided for in the act of sale.

On the whole, we are at a loss to conceive how the judge, *a quo*, could maintain the defendants' opposition, without any other evidence but the act on which the order of seizure and sale was obtained. It is clear, in our opinion, that the stipulations therein contained, so far as they can be used to show the acts of the parties at the time of the sale, are adverse to the opponents' pretensions.

It is therefore ordered, that the judgment of the Commercial Court be annulled; that the defendants' opposition be overruled; and that the rule by them obtained be discharged, with costs in both courts.

RAPHAEL TOLEDANO v. JAMES DESBAN.

The vendor is bound to perfect the title of his vendee, before he can call upon the latter, for payment of the purchase money.

APPEAL from the District Court of the First District, Buchanan, J.

Toledano v. Desban.

J. F. Pepin, for the plaintiff.

Greiner, for the appellant.

SIMON, J. The plaintiff seeks to obtain the rescission of a certain sale of real property, and forty shares of Union Bank stock, bearing mortgage thereon, made to him by the defendant, on the 18th of June, 1839. He states that the defendant never complied with the conditions of the sale, and never transferred to him the forty shares of the stock of the Union Bank, which, resting on the property, form an essential part of the sale; and that on account of this failure on the part of the defendant to fulfil the conditions of the sale, he, (the plaintiff,) has been unable to dispose of the property.

The defendant pleaded the general issue, and further averred, that he never was put in default with regard to any of the conditions of the sale; that plaintiff never made any application to the Union Bank to obtain its assent to the transfer of the stock; that had he done so, and obtained the assent of the Bank, he could have obtained the transfer of the stock by exhibiting the copy of his act of sale, and of the act of sale of the same property to the defendant; that the plaintiff never had any opportunity to sell the property as by him alleged; and that he, (the defendant,) is ready, and always has been, to fulfil the conditions of the sale which by law he is bound to perform.

There was judgment below, in favor of the plaintiff, according to the prayer of his petition; from which, after an unsuccessful attempt to obtain a new trial, the defendant has appealed.

The act of sale under consideration, after giving the description of the property sold, recites that the defendant sells: "*De plus quarante actions dans le fonds capital de la Banque de l'Union de la Louisiane qui reposent sur ladite propriété, et que le dit sieur Desban s'oblige à transférer, immédiatement, sur les livres de la Banque audit sieur Toledano.*" The condition of the sale is stipulated to be \$7913,33, to be paid: "*1° \$1600 en se mettant au lieu et place du vendeur pour le paiement de pareille somme par celui-ci à la Banque de l'Union, avec les intérêts depuis le mois de Janvier 1837, la quelle somme, avec les intérêts depuis ladite époque l'acquéreur promet, et s'oblige, d'acquitter à la dé charge du vendeur.*"

The evidence shows, that the plaintiff had employed Eugène Villatté to see the defendant on the sale of the stock in question, in order to have the same transferred to him. The witness Villatté states, that defendant replied that he could not transfer the shares, as Mr. Banks, who had sold the property to him had not transferred the stock. The witness saw Banks several times, and requested him to make a transfer of the stock to Desban, and had an act ready for that purpose. It was presented to Banks, and defendant did not come at the time appointed, and Banks did not make the transfer in consequence. Witness spoke to Desban several times, and he often made appointments, but did not come at the time appointed. Witness wrote to him accordingly, and acted as plaintiff's agent in the matter. He states also, that two persons, Ferrière and F. Gardère, wanted to purchase the property, but did not, because the transfer of the stock had never been made to the plaintiff.

The Cashier of the Union Bank testifies, in substance, that the forty shares in question stood on the books in the name of Banks. After Banks' death, and a few months ago, the shares were transferred to the defendant on said books, on the presentation of an act of transfer to him. The consent of the board of directors is necessary for the transfer, and witness could not allow it without such consent. The Bank generally requires that all the arrears should be paid, though this is sometimes dispensed with. He transferred the stock to defendant without payment of the arrears, because it was the same property. Witness would not transfer this stock to plaintiff, unless the arrearages were paid, and thinks the board would not. Defendant should pay up the arrearages, as the vendor always pays up the arrears on the stock. It appears also, from the testimony of the Cashier, that on the 7th of June, 1842, Union Bank stock was selling at six to nine per cent premium, and that on the 15th of June, 1839, and for some time afterwards, the same was selling at a premium of about twenty per cent.

Without its being necessary to inquire into the question, whether the defendant was properly and legally put in default, and whether the plaintiff should have paid the amount by him assumed to be paid to the Union Bank, previous to obtaining the transfer

of the stock on the books of the Bank, we think that the decision of this cause must turn upon the inquiry, whether the defendant had a right to sell and transfer the stock in question at the time of the sale, and, if he had not any right then, whether, he has acquired any since?

The sale stipulates, that the vendor obligates himself to transfer the stock *immediately*, on the books of the Bank, to the vendee. At that time, the shares were not in his name, but were in the name of Banks, and the defendant's title, if he had any, was unknown to the directors of the Union Bank. So far, the defendant was perhaps without any right to dispose of the stock, as the sale thereof would have been a sale of Banks' property. At all events, the stock by him sold, did not stand in his name on the books of the Bank; and this shows, that he could not make a transfer thereof, as he could not comply with the requisites of the charter of the Union Bank. In the case of the *Union Bank v. Desban*, (2 Robinson, 486,) decided last year, we held that, under the charter of the Union Bank, it was necessary first to obtain the consent and approbation of the directors. We considered this as a prerequisite to the sale and transfer of the stock; and said, that under the 29th section, "we understand that when a stockholder intends or wishes to transfer his stock, the first step he has to take, is to apply to the board of directors, to lay before them a statement of the circumstances under which the transfer is to be made, and of the new mortgage or securities which are to be furnished." This never was, and could not have been done by the defendant, who was thereby in the absolute impossibility of transferring the stock *immediately* to the plaintiff; and it is clear that he had no right to sell said stock, as he was not in a position to give a title to the purchaser. Indeed, how could the defendant validly sell and transfer the forty shares of stock to which he had no apparent title on the books of the Bank? How could he obtain the assent of the directors? It may be true, that he had a title thereto which we declared to be valid in the case above quoted, on the ground that his vendor had complied with the requisites of the charter; but here it is shown, that he never did apply to the board of directors for their approbation, and that, although their consent is necessary for the transfer, this has not, *even yet*, been obtained.

It has been urged that, under the stipulations of the act of sale, it was the duty of the plaintiff to pay the arrearages due to the Bank, in order to obtain a transfer of the stock. The obligation to transfer the stock immediately, stipulated in the act of sale, appears to be distinct from the promise to pay the price, and does not depend upon the payment to be made to the Union Bank by the vendee. It may be considered as a part of the essential requisites necessary to perfect the title of the plaintiff to the stock by him acquired, and the defendant was bound to comply with this obligation, before being entitled to call upon the plaintiff for the payment of the purchase money. Suppose the plaintiff to have been ready to pay the amount by him assumed towards the Bank, could he have obtained the transfer of the stock sold, by making a tender of the sum due; and could he have sold and transferred it to others? Certainly not. The defendant was unknown to the Bank as a stockholder; and had he been known as such, he had never complied with the section of the charter, which requires the assent of the board of directors to the transfer of his stock to the plaintiff. It will be conceded, that the plaintiff never was recognized as a stockholder by the Bank, although defendant had promised to cause it to be done. This was, in our opinion, a radical defect in the title attempted to be transferred or sold by the defendant to the plaintiff, which necessarily prevented the latter from disposing of the property, as shown by the evidence. This defect, or nullity, has never been removed, notwithstanding the efforts of the plaintiff. The contract is yet imperfect, and as such, it is clear, that the sale under consideration cannot stand, and must be cancelled.

The view we have taken of the respective obligations of the parties, is in accordance with our decision in the case of *The City Bank v. Toledano*, (1 Robinson, 570,) where the same facts were made to appear in support of the defence. There, we held, that as the rescission of the contract of sale was not, and could not be demanded, in that suit, and as the stock might hereafter be transferred to the defendant, our judgment should only be one of nonsuit against the plaintiff; but the right to recover was denied to the plaintiff, until the completion of Desban's contract relative

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to the Bank stock. As to the plea of prescription, we think it is untenable. Art. 2474 of the Civil Code is not applicable.

Judgment affirmed.

HERCULE BRASSAC v. JOSEPH MARCEL DUCROS.

Where a wife has obtained against her husband, a judgment for the separation of property, and ascertaining the amount of her dotal and paraphernal rights, the creditors of the latter may still require her to prove her claims contradictorily with them, whenever they have reason to suspect that the separation has been made with a view to defraud them; but they must put her on her guard by alleging fraud and collusion. Where no such allegation is made, she will not be bound to prove her claims *aliunde*, nor can the correctness of the judgment, or the sufficiency of the evidence upon which it was rendered be inquired into.

To secure a debt due to mortgagee, twelve lots of ground were mortgaged by the same act, but separately and specially, each lot as security for a fixed part of the debt; and the wife of the mortgagor renounced all her rights, actions, privileges, and mortgages on them. An order of seizure and sale having been obtained, lot No. 1. sold for more than the part of the debt for which it was mortgaged, while all the others sold for less than the sums for which they were mortgaged. In a contest between the wife and mortgagee: *Held*, that the wife must be considered as having renounced her rights only to the extent of the mortgage on each lot; and that the surplus realized by the sale of lot No. 1., cannot be claimed by the mortgagee, but must be applied to the satisfaction of the rights of the wife, after deducting its proportion of the costs of the sales, calculated according to the price it brought.

The decision in *Doubriere v. Grillier's Syndic*, 2 Mart. N. S. 171, that an act *sous seign privé* will have effect against third persons from its date, if possession accompanied or followed its execution, was made under the Code of 1808, and is inconsistent with the provisions of art. 2417 of the present Civil Code.

A wife who has renounced the community of *acquêts*, must be regarded as a third person in relation to sales of community property made during the marriage; and every thing done during the marriage in relation to the sale or alienation of property, must be viewed as done by the husband alone.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. The plaintiff sued out an order of seizure and sale under an authentic deed of mortgage, in which the defendant, to secure to him a loan of \$5000, with interest at the rate of ten

per cent per annum, during five years, had mortgaged in his favor twelve lots of ground in the suburb Montegut, each lot being separately and specially mortgaged, for a fixed portion of the capital and interest of the loan. From the return of the Sheriff it appears, that the lot No. 1., situated at the corner of Montegut and Amour streets, which was mortgaged for \$750 brought \$1350; while the other lots, which were sold on a different day, brought each of them less than the amounts for which they were respectively mortgaged, and that the law charges for both sales, and the taxes due on the property amounted to a sum of \$416,37. The wife of defendant, separated of property from him, took a rule on the plaintiff, the Sheriff, and the judgment creditors, to show cause why this surplus of \$600 brought by the sale of the first lot over and above the amount for which it was mortgaged, should not be paid to her in partial satisfaction of a judgment she had obtained against her husband, in the Parish Court, for the sum of \$4393. To this rule the plaintiff and the Sheriff alone answered, denying her right to receive the surplus claimed, in consequence of her renunciation in the act of mortgage, and of a claim set up by P. Marsondet, Esq. to one moiety of such surplus, averring that at all events, all the costs of the suit should be paid out of the proceeds of the first lot sold. P. Marsondet then moved for a rule on all the parties already in court; and prayed, in opposition to the wife, that one-half of the surplus fund be paid over to him, as the half owner of the property. The two rules were consolidated and tried together. The Judge below dismissed the rule taken by the wife, and allowed to P. Marsondet the balance of the surplus fund, remaining after discharging out of it the costs and charges of every description. The former has appealed.

In support of her claim, the appellant produced on the trial, the record of a judgment she had obtained in the Parish Court against her husband for \$4393, of which \$4060 were pronounced to be the amount of her dotal property, and \$333 the amount of her paraphernal property. This judgment having been received without opposition, and no suggestion of fraud or collusion having been made, it should have been considered good and sufficient evidence of the amount due to her. The creditors of the husband have the undoubted right of requiring the wife to prove

her claims against him contradictorily with them, whenever they have reason to suspect that the separation has been made with a view to defraud them; but, in such a case, they must put her on her guard by alleging fraud and collusion. When no such allegation is made, the wife is not bound to prove her claims *aliunde*; nor can the correctness of the judgment, or the sufficiency of the evidence upon which it was rendered, be inquired into. Such have been the uniform adjudications of this court on the subject. 1 Mart. N. S. 170. 8 Ib. N. S. 403 and 459. 1 La. 379. 4 La. 422. 14 La. 459. Under this view of the effect of the judgment obtained by the appellant, it becomes unnecessary for us to examine the several questions raised in the argument, in relation to the evidence upon which it was rendered. From a return made on a *feri facias*, issued to the Sheriff of the parish of St Martin, in the case of Madame Ducros against her husband, it appears that a sum of \$2101,50, was made by the sale of some property of the defendant's levied upon there, leaving yet due to her \$2291,50.

It has been urged, that, having renounced in favor of the plaintiff, all her rights, mortgages, and privileges on the several lots of ground mortgaged to him, this renunciation, being general and unlimited, must extend to any amount each lot might bring, until the whole of the loan made by the plaintiff to her husband, be covered. Although the twelve lots of ground are mortgaged in one and the same act, the mortgage on each of them is as distinct, and special, as if twelve separate acts of mortgage had been executed. So it is with the renunciation of the wife, who must be considered as having renounced her rights in favor of the plaintiff, to the extent of his mortgage on each lot, in the same manner as she would have done, had each mortgage been executed separately. We, therefore, consider that she had yielded her right of priority to the plaintiff, only to the extent of his mortgage on the lot No. 1, and the costs necessary to carry the same into effect. But the judge below has thrown the entire amount of the costs and charges, of every description, on this lot in particular; thus, taking the whole sum of \$416 37 out of the surplus claimed by Madame Ducros, and leaving the proceeds of the other lots to be received by the plaintiff, free of any charge, whatever. Although there is but one suit, yet the mortgaged lots

having been sold separately, and there being several claimants for the proceeds of one of them, we think that this lot should be charged only with its proportion of the costs, according to the price it brought; besides, in the amount of \$416 37, is included \$89, due for taxes on the whole property, which should not, surely, be paid out of the proceeds of any particular lot.

P. Marsondet's claim is next to be considered. He alleges that he was the half owner of the property included in the mortgage upon which this suit is brought. And to make good his allegation, he has produced an act *sous seign privé* of the defendant, in which the latter acknowledges him to be proprietor for one undivided half of the same. This act purports to be dated on the 5th of June, 1836, the day after that on which the defendant purchased the property in his name alone, by authentic act; and does not appear to have been ever recorded in the office of the Recorder of Conveyances.

The counsel for Madame Ducros contends; that, as to her, this act bears date only from the day that it was produced in court; that her husband could not be admitted as a witness under oath against her; and that, therefore, his written declaration, unsupported by oath, and bearing date on the day of the trial below, can have against her no effect whatever. Divers acts of possession have been shown by Marsondet, with a view to bring his case within the doctrine laid down in *Doubrere v. Grillier's Syndic*, 2 Mart. N. S. 171, in which this court held, that an act under private signature will have effect against third persons from its date, if possession has accompanied or followed its execution. In relation to this decision it has been correctly remarked, that it was made under the provisions of the old Civil Code, and is inconsistent with, and contrary to the present Code, which provides (art. 2417,) that "the sale of immoveables or slaves, made under private signature, shall have effect against the creditors of the parties, and against third persons in general, only from the day such sale was registered in the office of a notary, and the actual delivery of the thing sold took place." But the counsel for the appellant relies mainly on the 5th section of the act, approved March 20th, 1827, creating the office of Register of Conveyances, which declares that, "Acts of transfer of property

whenever they are not registered agreeably to this law, whether they are passed before a notary public or otherwise, shall have no effect against third persons, but from the day of their being registered."

The inferior Judge was of opinion that the act under private signature, produced by Marsondet, was good and binding as against Madame Ducros, although not recorded, because she was not to be viewed as a third person. In support of this position, it is argued, that a sale of community property must be considered as made by the husband and wife both, and that the latter cannot pretend to be a third person in relation to it; that the acts of the husband, as the head and master of the community, are the acts of his wife, who, through his agency, acts in the same manner as if she were present at the sale. We are by no means prepared to adopt these views. They are founded on the idea of a legal partnership existing between the husband and the wife. Such a partnership does exist in contemplation of law, but only, we apprehend, when she accepts the community; if she renounces it, the community is, as to her, as though it never existed, and every thing done during the marriage in relation to the purchase or alienation of property, must be considered as done by the husband alone. If, although the wife renounces the community of *gains et acquêts*, she is to be considered as a party to all the acts of the husband, while he was the head of the community, her renunciation would be of no avail to her. It would follow, that she could exercise, in the prosecution of her rights, no recourse against the community property sold during the marriage, when there is nothing better settled in our jurisprudence than that she has such a recourse. 3 Mart. 392. 7 Ib. N. S. 69. 10 La. 198. *Johnson v. Pilster*, ante, 71.

In speaking of the effects of the renunciation, one of the most enlightened commentators of the Napoleon Code says: "*A la vérité, la femme, avant sa renonciation et au moment de la vente, était commune en biens. Mais il ne résulte pas de là qu'on puisse lui opposer qu'elle doit être considérée comme associée à la vente faite par son mari, seigneur de la communauté; car, au moyen de sa renonciation, elle est censée, n'avoir jamais été co-propriétaire, et par conséquent n'avoir jamais contracté par l'organe de son mari.*"

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"Le droit du mari d'engager sa femme en vendant un acquêt, est essentiellement subordonné à la faculté qu'a celle-ci de renoncer à la communauté. Lorsque cette renonciation a lieu, tous les actes faits par le mari lui demeurent exclusivement personnels." Troplong, Priv. et Hypoth. 2 vol., No. 433ter, p. 88. We conclude, that, from the moment the appellant renounced the community, she became a third party to all the acts of her husband, done as head of such community: she stands in the position of all his other creditors, in relation to such acts; and that, therefore, the act under private signature, not having been recorded, as required by law, can have no effect against her.

It is, therefore, ordered that the judgment of the District Court be reversed. That the rule taken by P. Marsondet be dismissed, with costs; and, that of Madame Ducros be made absolute, and that she do, accordingly, recover such balance as may remain of the proceeds of a cash sale, made on the 8th of September, 1842, of lot No. 1 of the property herein seized, deduction being made of the plaintiff's mortgage, and interest thereon, and, of the proportion of the costs, and charges, to be borne by the said lot No. 1, according to the price it brought, compared with the aggregate amount, brought by the twelve lots, on which plaintiff had mortgages. The costs of this appeal to be borne by the appellees.

Benjamin, for the appellant.

D. Seghers, for the appellees.

Marsondet, pro se.

JAMES VANCE v. ANTOINE LAFFERANDERIE and others.

An allowance made by a Court of Probates to one for services as an auditor of the accounts of a succession, may be seized under a *feri facias*. C. P. 647. It cannot be considered as the salary of an office.

Article 1987 of the Civil Code declaring what rights cannot be made liable for the payment of debts, is repealed by art. 647 of the Code of Practice, so far as they are inconsistent with each other; under the latter the Sheriff may seize, all sums of money due to the debtor on whatever right, unless for alimony or salaries of office.

APPEAL from the District Court of the First District, *Buchanan, J.*

J. Mitchell, for the appellant, cited the case of *Allen v. Arnouil*, 1 Robinson, 399, as decisive of this case.

D. Seghers, for the defendants.

SIMON, J. The plaintiff, having been appointed by the Court of Probates of the Parish of Jefferson, an auditor of accounts for a certain succession opened in that parish, was allowed the sum of \$500 dollars for his services. His claim was placed upon the general *tableau* of distribution of the estate, as a privileged debt, in these words: "*James Vance, for services rendered in settling accounts, arranging books, &c., \$500.*" In the mean time, an execution having been issued against the plaintiff by Lafferanderie, on a judgment which had been transferred to the latter by Joseph Abat, it was levied upon the sum allowed him in the *tableau*, and the Probate Judge was notified of the seizure. Whereupon, plaintiff obtained an injunction to prevent the money's being paid by the Probate Judge to the Sheriff, and instituted the present proceedings, to which the Probate Judge, the Sheriff, and the judgment creditor were made parties, for the purpose of setting aside the seizure, on the ground that the moneys due him for his services, rendered as an auditor of accounts, are not liable to seizure.

The inferior Judge rendered judgment in favor of the defendants, and dissolved the injunction, from which the plaintiff has appealed.

We concur with the judge, *a quo*, in the opinion, that the 1987th art. of the Civil Code has been repealed, amended or modified by the 647th art. of the Code of Practice, so far as the two articles are contrary to, or inconsistent with each other. This opinion is supported by a statute of 1824, (Bullard & Curry's Digest, 150, No. 16,) which provides: "that in case the Code of Practice should contain any provisions contrary or repugnant to those of the Civil Code, the latter shall be considered as virtually repealed, or thereby amended in that respect." Now, under art. 647 of the Code of Practice, the Sheriff is authorized to seize *all sums of money* which may be due to the debtor, in *whatsoever right*, unless it be for *alimony* or *salaries of office*; whilst the Civil Code,

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art. 1987, declares that the rights of a debtor to money due *for the salary of an office* (in the French text, "*pour salaires d'emploi public*,") or wages, or *recompense for personal services*, cannot be made liable to the payment of debts. Thus it is clear, that as the law now stands under the Code of Practice, and under the statute approved on the 22d of March, 1842, p. 380, amendatory of arts. 644 & 647 of that Code, the art. of the Civil Code has been greatly modified ; that the prohibition to seize the debtor's rights and credits, only extends to alimony or salaries of office, and to such other rights as are included in the said law of 1842 ; and that all other sums due him in whatsoever right, may be seized on execution, and are made liable to the payment of his debts. It is perhaps worthy of notice that the sums due to a debtor, for wages or personal services, have not been inserted in the law of 1841, as being exempt from seizure. The case of *Allen v. Arnouil*, 1 Robinson, 399, relied on by the appellant, is not applicable. There the money sought to be seized, proceeded from the salary of the defendant as clerk of the Mechanics and Traders Bank. That was the salary of an office held under the Bank. The defendant was one of its officers, and his salary was to be paid monthly in advance. But we cannot consider the compensation allowed to an auditor of accounts, for his personal services in the settlement of a succession, as being the salary of an office in the true sense of the law. Code of Practice, art 462.

Judgment affirmed.

THE UNION BANK OF LOUISIANA v. DAVID LATTIMORE.

The act of 13th March, 1818, relative to the election of domicil, with regard to promissory notes, executed in favor of the banks, is repealed by sect. 25 of the act of 25th March, 1828.

Where the stockholder of a bank gives a note to the institution, even for the re-payment of a sum he was entitled to borrow, under its charter, the claim of the bank against him, is similar to that against any other borrower ; and the obligation of the stockholder, results rather from his note, than from any relations as a partner in the bank. He cannot, consequently, where his domicil is in another parish, be cited before the tribunals of the place where the bank is established, under art. 165, No. 2, of the Code of Practice, relative to suits against partners.

APPEAL from the District Court of the First District, *Buchanan, J.* This was an action against the defendant, a resident of the parish of Concordia, and a stockholder in the Union Bank, for a balance due on a stock note executed by him, payable at the banking house of the plaintiffs in New Orleans. The defendant excepted to the jurisdiction of the court, on the ground that the petition showed that he was a resident of the parish of Concordia, and contained no allegation of any fact which could give jurisdiction to the court. This exception was overruled, and a judgment rendered against the defendant, from which he has taken this appeal.

Denis, for the plaintiffs, contended: That the court had jurisdiction, under the act of 13th March, 1818, citing *Jennison v. Warmack*, 5 La. 493; as well as under art. 165, No. 2, of the Code of Practice, which provides that, in all matters relative to a partnership, the partners must, so long as it continues, be cited to appear before the tribunal of the place where it is established: that the stockholders are partners, and that the suit could not be brought out of the First Judicial District.

R. N. and A. N. Ogden, for the appellant. Assuming the act of 13th March, 1818, to be still in force, it is not shown that the defendant ever made an election of domicil, as contemplated by that law. That act provides that such election shall be made in the form which it prescribes, or in any other, sufficiently expressive of the intention of the party. This form has not been pursued in the present case; nor does the note contain any thing expressive of an election of domicil, unless it be considered that whenever a place of payment is indicated in a note, that is itself an election of domicil. But the act of 1818 was repealed by the repealing act of 25th March, 1828. The case of *Jennison v. Warmack* is not inconsistent with this position. This subject was recently under consideration in the case of *Waters v. Petrovic, &c.*, 19 La. 584, where it was decided that the act of 1823, by which the drawer of a note was rendered incompetent as a witness, was repealed by the act of 1828.

Art. 165 of the Code of Practice is inapplicable to this case, which is not a matter relative to any partnership, but a suit by a corporation. Moreover, this article only applies to suits against

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the partnership by third persons. It will not be contended that the partnership can sue a debtor, having a different domicile, before the courts of their own, under this article.

MARTIN, J. The defendant, and appellant, assigns, as an error apparent on the face of the record, that the court overruled his exceptions to its jurisdiction on the score of commorancy. The petition shows that his residence is in the parish of Concordia. The counsel for the Bank has urged, that the suit was rightly brought in the District Court of the First Judicial District; the defendant, on the face of the note sued upon, and made payable in New Orleans, having elected his domicile in that city; and, secondly, that this is a suit relating to a partnership between the parties. It is true, that by the act of 1818 made in favor of the banks, drawers of notes, made payable in the city of New Orleans, by persons who have no domicile therein, elected a domicile in that city, and were suable on such notes, in the courts sitting there. Greiner's Digest, No. 187, *et seq.* But this act was, in our opinion, repealed by the 25th section of an act of Assembly, approved March 25th, 1828, p. 160, which provides, that all the rules of proceeding, which existed in this state before the promulgation of the Code of Practice, with a few exceptions, none of which touch the act of 1818, are abrogated. This latter act, certainly established a rule of proceeding, and must, consequently, have been repealed. The counsel for the plaintiffs has urged, that the Code of Practice, art. 165, No. 2, has made an exception to the rule, that every defendant must be sued before the court of his domicile, in matters relative to a partnership. We are of opinion, that when the stockholder of a bank gives a note to the bank, even for the re-payment of a sum which he was entitled to borrow, under the charter of the bank, the claim of the institution on him, is of the same nature as that it may have against any other borrower; and that the obligation of the stockholder results, rather from his note, than from any matters relative to the partnership.

The District Court, in our opinion, erred in overruling the defendant's exceptions.

It is therefore ordered, that the judgment be annulled, the de-

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fendant's exceptions sustained, and the petition dismissed, with costs in both courts.

FERDINAND CLARK v. PETER LAIDLAW and another.

The master of a vessel cannot hypothecate her for a pre-existing debt, and the necessity for the loan must be shown to have existed at the time it was made. The bond is not evidence of this necessity, nor of the absence of other means of obtaining the money. This must be shown *aliunde*, and otherwise than by the statement of the master, who cannot acquire authority from his own assertions.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

W. S. Upton, for the appellant.

Carter and Pierce, for the defendants.

MARTIN, J. The intervenor, B. C. Clark, is appellant from a judgment of nonsuit. The facts of the case are these: The defendant Laidlaw, was the owner of a steamboat which he chartered to Maxon & Young, who put the defendant Gillet therein, as master. She was consigned to the plaintiff, F. Clark, in Havana, who instituted a suit against the present defendants on a bottomry bond, given to him on the steamboat, by the other defendant Gillet, on an allegation that the charterers, not having the means to pay the expenses of the voyage, had surrendered her to the master, who, being unable to procure money to pay the charges against her, and those attending her return home, otherwise than by an hypothecation, had received from him (F. Clark) the sum of \$1371 43, and had given the bond and bill of exchange sued on. B. C. Clark, a creditor of F. Clark, by a judgment, had the present suit sold under execution, and, having become the purchaser of it, intervened. His right to do so was doubted by the first Judge, but the view which he took of the whole case, led him to the conclusion that it was unnecessary to examine it. A nonsuit was entered as to the interest of F. Clark, and the suit proceeded between B. C. Clark and the defendants. The only evidence of the refusal, neglect, or inability of the charterers to

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pay the expenses of the boat, and of the necessity of her hypothecation, consisted of the recital of the bottomry bond, and of the statements of the defendant Gillet to F. Upton. No detail of the expenses was given. This did not appear to the first Judge sufficient to sustain a recovery. He, therefore, gave the judgment appealed from. As the defendants and appellees have not required of us a different judgment than that of the Commercial Court, it has not become our duty to examine the rights of the intervening party and appellant under the *fi. fa.* The interest of ship-owners would be put in great jeopardy, if they were bound to pay any bill drawn on them, or bottomry bond given by the master, even in the case in which he was put on board by a charterer, without requiring proof of the circumstances which authorized the master to obtain money in a foreign port, on the credit of his owners. "The master cannot hypothecate for a pre-existing debt, and the necessity of a loan must be shown to have existed at the time it was made." Kent's Com. 357. *The Brig Hunter*, Ware's Rep. 249. The bond is not evidence of this necessity, nor of the absence of other means of obtaining the money. This must be shown *aliunde*, and otherwise than by the assertion of the master, as he cannot acquire an authority from his own assertion only. The Commercial Court did not err.

Judgment affirmed.

JOHN EGERTON and another v. HENRY S. BUCKNER and others.

Defendants, who were merchants, delivered to the plaintiffs, money brokers, a certain sum in notes of the Bank of the United States, and received from the latter another sum in Louisiana bank notes, with the understanding, that either party should be entitled to demand the return of a like amount of such notes as were originally delivered by them, on giving certain notice to the other. Plaintiffs, having offered to return the amount of notes received by them, after giving the notice agreed upon, demanded those which they had delivered to defendants; and, on the failure of the latter to restore them, notified them, that unless the amount was returned by a given time, they, (plaintiffs,) would sell the United States Bank notes for what they would bring in the market, and hold defendants responsible for the difference between the proceeds, and the value of the notes received by them. Plaintiffs sold

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the notes through a broker, and purchased them themselves, and sue for the difference. *Held*, that the real character of the transaction is one of mutual loans for consumption—an agreement by the parties to deliver to each other a certain number of bank notes to be used by them respectively, under the obligation of returning an equal amount of the same kind; that plaintiffs had no right to sell the notes as they did, nor to purchase them themselves; that on defendants' refusal to receive the notes, plaintiffs should have deposited them in some safe place, at the risk of the former, and have proceeded to recover the amount of notes delivered by them, under the provisions of arts. 2892 and 2893 of the Civil Code, at their value on the day when defendants should have restored them, according to the stipulations of the original agreement as to notice.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* The petitioners allege, that in January, 1842, they applied to the defendants for a loan of notes of the Bank of the United States to the amount of \$14,000; that as those notes were then worth in the current bank notes of New Orleans about seventy-two cents on the dollar, they deposited in the hands of the defendants \$10,080 in New Orleans notes; that it was agreed between the parties that defendants should return the sum deposited with them, when requested, at any time after two days notice, on receiving from the petitioners a sum of \$14,000 in notes of the Bank of the United States, and that the latter should restore to the defendants \$14,000 in notes of the Bank of the United States, after six days notice, and on receiving back the sum deposited with them by the petitioners, &c. It is further averred, that on the 7th of February, 1842, petitioners notified defendants that they should require the return of the money deposited with them, two days thereafter, offering to pay back the \$14,000 in United States Bank notes; that after the expiration of the two days, to wit, on the 10th of February, they tendered to the defendants that sum, and demanded the return of the amount deposited by them; that defendants refused to perform any part of this contract; that being unable to spare from their business the large sum placed in the hands of the defendants, they sold, after notice to the latter, for their account, and for the best price that could be obtained, the said \$14,000 of notes of the Bank of the United States, the nett proceeds being \$7105, leaving a balance due to petitioners of \$2975, for which they bring suit.

The defendants pleaded a general denial. The evidence ad-

duced on the trial is detailed in the opinion delivered by GARLAND, J. The lower court gave judgment for the plaintiffs, from which the defendants have appealed.

Benjamin, for the plaintiffs. The defendants were put in *morra*. The contract and its breach being clearly established, the law gives the plaintiffs the *choice*, to sue either for a specific performance, or for damages. Civil Code, art. 1920. "On the breach of *any* obligation to do or not to do, the obligee is entitled *either* to damages, or, in cases which permit it, to a specific performance of the contract, *at his option*." The plaintiffs chose to sue for damages, because they could not afford to keep so large a sum of money locked up during the pendency of a suit for specific performance.

The plaintiffs having a right to damages, the only question remaining is, as to their amount? The answer is, the difference between the \$10,080 which defendants ought to have paid for the \$14,000 of United States Bank notes, and the market price of the latter when defendants were put in default. Now, the testimony is conclusive, that the market price on that day did not exceed fifty cents on the dollar. No one in town would give more. They were offered by the broker, to the defendants themselves, who, after refusing to purchase for several days, finally offered fifty cents on the dollar for them. No higher offer could be got; and the plaintiffs finally took them themselves at fifty-one cents on the dollar, and sued for the difference.

It is not contended that this was a real sale; the vendor and vendee being the same person: but we say, that no law required the plaintiffs to sell the notes at all. They might have kept them for their own account, and yet have sued for the difference between the price of seventy-two cents on the dollar, and the market price. The proof is conclusive, that nothing better could have been obtained for the notes than the price at which they were kept, and therefore the defendants owe the difference. If a man buys from me a barrel of flour for \$10, deliverable on the 1st of January next, and refuses to take it when tendered on that day, the market price being then \$5, I may surely make him pay me the \$5 difference, whether I sell the flour to some one else, or consume it in my own family.

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L. C. Duncan and *Eustis*, for the appellants. If the United States Bank notes are to be regarded as a pledge or pawn, they should have been sold at public sale; if as the property of the defendants, they could only be sold after judgment. *The Second Municipality v. Hennen*, 14 La. 559. *Wilbor v. M'Gillicuddy*, 3 Ib. 382. *Kelly v. Caldwell*, 4 Ib. 38.

GARLAND, J. This suit arises out of the following written instrument: "We have received from Buckner, Stanton & Co., \$14,000, in United States Bank notes, and have paid them \$10,080 in Louisiana bank notes, with the understanding, that whenever said Buckner, Stanton & Co. require the United States Bank notes, by giving five or six days notice, we are to return the said amount of United States notes, say \$14,000, and they are to return to us the amount of Louisiana bank notes, say \$10,080, by giving them two days notice. New Orleans, January 3d, 1842. (Signed,) EGERTON & Co."

The plaintiffs state in their petition, that "the motive for said agreement, on the part of Buckner, Stanton & Co., was to have the use of petitioners' money, until they should require to use their United States Bank notes, and the consideration or motive of petitioners was to realize the profit which they expected to make, by selling said United States notes, in New Orleans, and replacing them by others to be purchased at a lower rate at the north."

It is shown, that, on the 7th of February, 1842, the plaintiffs, in writing, informed the defendants, that they were ready to return to them the \$14,000 in United States Bank notes, and demanded of them, the sum of \$10,080 in currency, or *New Orleans money*. The person who made this demand says, that he had with him the \$14,000 in United States Bank notes, when he delivered the letter. On the 10th of February, the plaintiffs again wrote to the defendants saying, that on the 7th, they had informed them that they were ready to return them the United States Bank notes, and had demanded the return of \$10,080, in New Orleans currency, which had been given as security that the \$14,000 should be returned; and that, as that demand had not been complied with, they, the defendants, were further notified, that unless they returned the \$10,080, in New Orleans funds, on or before

12 o'clock, of that day, they, the plaintiffs, would sell the \$14,000 of United States Bank notes, for account of the defendants, and should any deficiency arise between the proceeds of the same, and the \$10,080, that they, the defendants, would be held responsible for the same. On both occasions, it is in evidence that an agent, or friend of plaintiffs, had the United States Bank notes in his possession, and offered them to one of the defendants, who refused to receive them, and return the \$10,080.

The United States Bank notes, were offered for sale by a broker, to a great number of persons. He could not get more than fifty cents on a dollar, offered for them; which sum, was offered by Buckner, one of the defendants; and finally, the plaintiffs themselves, bought them for fifty-one cents on the dollar, and now claim \$2,975, the difference between the proceeds of the sale, and the sum of \$10,080.

The evidence shows, that the motives stated in the petition actuated the parties. The plaintiffs are brokers, and were able to sell the United States Bank notes, in New Orleans, at seventy-two cents on the dollar; and the evidence shows, that those they purchased at the north, and had on the 7th and 10th of February, to return to the defendants, cost them only sixty cents on the dollar, less the commissions for purchasing, and there is no evidence of any such charge. The defendants were largely indebted to the Bank of the United States, which debts were not due, but they were preparing to meet them, by occasionally buying at a discount, the notes of the Bank. Not wanting, in the early part of January, 1842, to use the United States Bank notes, and having use for funds current in New Orleans, the defendants let the plaintiffs have them, as they could sell them at a profit, and buy others to replace them, before the defendants would have use for them, as was then supposed; and in return, they, the plaintiffs, let the defendants have the use of \$10,080, in current funds, for the use of which, they no doubt expected to make a profit also.

There is a mass of testimony, as to a demand made by the defendants, on the plaintiffs, to return them the United States Bank notes, about the 20th January, 1842, and their successful efforts to procure them from the Merchants Bank, and the refusal of the defendant Buckner, to go with Egerton to the Bank to receive

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them. Also, as to the means taken by the parties to put each other in default. There is also evidence to show, that since the plaintiffs, through their agent Goodman, purchased the United States Bank notes, at fifty-one cents on the dollar, they have been worth more. Hepburn, the broker they employed, says, "some small sales have been made since, at a higher rate; but he does not think that, for any amount in market, a higher rate could be got now. It is a great risk to buy, and large profits are expected." Bean says, that from the 25th of January, to 6th of February, those notes were at a discount of forty to forty-two per cent. He had \$30,000, which were bought at forty-five cents discount. On the 16th or 17th of February, Smith says that he purchased of the plaintiffs, at fifty-eight and one-half cents to the dollar. This was a few days after plaintiffs had taken the \$14,000 of Hepburn, their broker.

There was a judgment in favor of the plaintiffs, for \$2,975, with interest, from which the defendants have appealed.

As to the question, whether the parties were in default, we do not consider it very material. If it be, we are satisfied, that Buckner did not, by the request he made of the plaintiffs, on the 19th or 20th of January, put them in default, according to the provisions of the Civil Code, arts. 1905 to 1907. He did not give them the requisite notice of five or six days, nor offer to comply with his part of the bargain; and it is not clearly shown, that the plaintiffs put the defendants *in mora*. On the 7th of February, they gave the defendants notice, that they were ready to return them the \$14,000, in United States Bank notes. On the 9th, they commenced their suit for \$2,975, as being the difference between the proceeds of the sale of the notes and the \$10,080, and, on the next day, notified the defendants of their intention to sell them. The account of sales is not rendered, until the 14th or 15th of the same month; and the testimony of Hepburn does not state particularly the day, he sold to Goodman the agent of the plaintiffs. He says, it was some days previous to the 14th of February, and from all the circumstances, it would appear, that it was on the 9th, or the 10th. It appears that the plaintiffs knew the price on the 9th, as they then state in their petition, the deficiency claimed by them.

But it seems to us, that the real character of this transaction is one of mutual loans for consumption. It is an agreement by one of the parties, to deliver to the other, a certain quantity or number of bank notes, to be used by them respectively ; and the obligation is, to return as many, or as great an amount, in the same kind or quality. In this point of view, each party became the owner of the thing lent, and if it had been lost or destroyed, the loss would fall on the party having possession. Civil Code, art. 2881, 2882. Article 2284 of the same code, declares, that the obligation which results from the loan of money, can never be more than the numerical sum mentioned in the contract. If there has been any augmentation or diminution in the value, before the time of payment, the debtor is only bound to return the numerical sum which was lent to him, in such money as has currency at the time of payment. If the thing lent be provisions, whatever be the increase or diminution in the price, the debtor or borrower is bound to return the same quantity, and quality, and no more. Art. 2886.

It is evident, that the parties did not intend to make an exchange, nor an absolute sale, nor one with the benefit of redemption. The transaction has not the essential qualities of either of such contracts. The plaintiffs say to the defendants, you have a certain amount in United States Bank notes, which you cannot or will not use at present ; we can use them to advantage, and will return them to you when you want them, upon giving us five or six days notice. The defendants agreed to do so, in consideration of getting the use of \$10,080, in Louisiana bank notes, current at the time. The obligation was to return the same kind of thing.

These views of the case, bring us to the conclusion, that the plaintiffs had no right, after the defendants refused to receive the United States Bank notes, to sell them in the manner they did. They were not pledged to them, nor had they such rights as entitled them to proceed as in a case of sale, *à la folle enchère*. They were not the vendors of the notes, and if they had been, they did not proceed with the sale in a legal manner. They had no right to purchase the notes themselves, and thereby fix the deficiency. This doctrine has been well settled, since the cases

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of *Scott's Ex'r v. Gorton's Ex'r*, and *The Second Municipality v. Hennen*, 14 La. 116, 559. We see, in this case, the consequences of permitting such purchases. The plaintiffs, through their agent, purchased the notes from their own broker at fifty-one cents on the dollar, and in a few days after, we find them selling the same kind of notes, perhaps the very same, at fifty-eight and a half cents on the dollar.

The transaction was simple enough in the beginning. The plaintiffs' obligation was to return the United States Bank notes, and when the defendants refused to receive them, they should have been deposited in some secure place, subject to their risk, and they should then have proceeded to recover their \$10,080, in Louisiana bank notes, according to the provisions of articles 2892, 2893 of the Code. They seem to have been aware that such was the course for them to pursue, and state in their petition, that they could not spare from their business, the large amount they had placed in the hands of the defendants, and therefore sold the notes. We are consequently of opinion, that it is best to put the parties in a situation, where they can do that which they should have done in February last. We think, that upon the plaintiffs' giving the defendants \$14,000, in United States Bank notes, they are entitled to recover \$10,080, in Louisiana Bank notes, of such kind or value as they were entitled to receive on the 10th of February, 1842.

The judgment of the Commercial Court is therefore reversed, and the cause remanded for a new trial, with directions to the Judge to conform on the trial thereof, to the principles herein expressed, and otherwise, to proceed according to law; the plaintiffs and appellees paying the costs of this appeal.

SAME CASE—ON A REHEARING.

Benjamin, for the plaintiffs. Without entering into the question whether this contract was really a mutual loan for consumption, although it might perhaps be more correctly characterized

as a bargain for a future purchase and sale of the United States Bank notes at a price agreed on, it suffices that it is a *contract*. Now, in all contracts where one party violates his agreement, the other has a twofold remedy. He may, at his option, enforce a *specific performance*, or he may sue for *damages for the breach*. The plaintiffs have adopted the latter remedy, for the reasons alleged by them, viz. that they could not afford to lie out of their money, whilst suing for a *specific performance*. The court is, therefore, undoubtedly correct in saying that if the plaintiffs had deposited the \$14,000 of United States Bank notes in a place of safety, after tendering them to the defendants, they might recover the \$10,080 which they paid to the defendants. But the court has not the right to *compel* plaintiffs to sue for a specific performance; nor has it the right to change this suit from one for damages into an action for specific performance, by remanding the cause with instructions to that effect. The *option* is *ours*. Civil Code, art. 1920. "On the breach of *any* obligation to do or not to do, the obligee is entitled either to damages, or in cases which permit it, to a specific performance of the contract, *at his option*."

Having established then that the plaintiffs have a right to maintain this action in the form which they have selected, and that they have legally put the defendants in default, there remains but one question: What is the amount of the damages?

Whether the sale made by the broker to the plaintiffs be regular, or not, is a matter of no consequence. It was one way of ascertaining the amount of the damages. The defendants would not be the less liable to damages, if the United States Bank notes had remained to this hour in possession of the plaintiffs. If the court think, that on the day of the sale by the broker, the notes were worth more, then it will diminish the damages; but no such proof appears on the record. If, however, the court deem an *actual* sale of the notes requisite, and that the plaintiffs' right to recover damages depends absolutely upon the fact of a sale, the proof is in the record of an actual sale at the very highest market price, viz. fifty-eight and one-half cents per dollar; so that, by diminishing the amount of the judgment below, at the rate of seven and one-half cents on the dollar, the plaintiffs would be still entitled to a decree for nineteen hundred and twenty-five dollars.

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The appellees earnestly urge upon the court, since its decree shows plainly that the equity is with the plaintiffs, not to remand the cause. The appellees are secured by an appeal bond signed by a surety, who has in his hands, as they are informed, ample indemnity. If the case be remanded they will be deprived of this security, and as the defendants are now bankrupts, the loss will be irretrievable.

J. C. Duncan, and Eustis, for the appellants. It is not perceived, that there is any matter presented by the counsel which has not already been considered by the court. It is not understood, that the position assumed by the court, that the case presents for consideration the obligations arising under mutual loans for consumption, is at all shaken. The right to sell on the default of the vendee, in the example stated, depends upon principles peculiar to the contract of *sale*. Where is the authority for extending them to the contract of *mutuum*? If the thing loaned is not returned at the time agreed on, the party in default pays interest. Civil Code, art. 2893. The plaintiffs have their action, on a case *properly made out*, for the sum loaned and the interest. On recovering the money loaned, they must give back the notes borrowed.

It is understood, that the court does not admit the *standard of damages* assumed by the argument of the defendants' counsel; and as no authority is presented against the views of the court, no new argument is required in support of them. A more mature consideration of the subject will confirm them. The borrower has no right to take to himself the thing borrowed at the market price, and to sue for the difference between that and the value of the object loaned. This standard may be applicable to the contract of *sale alone*, but is inconsistent with the obligations of the contract under consideration.

GARLAND, J. A re-hearing was granted in this case, on an allegation and admission after the judgment, that there was a clerical error in the record, which misled the court on one point; and because a doubt was created in our minds by the ingenious arguments contained in the petition, which have induced us to re-examine the case with great care.

The correction of the record, by showing that the suit was

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brought on the 19th of February, 1842, instead of the 9th, proves that the defendants were legally in default, about which fact some doubt was expressed in our opinion ; but that point was one of minor importance in the case. The great objection with us was, the mode pursued in establishing the difference between the United States Bank notes, and those of the Banks of Louisiana, and thus fixing the measure of damages. We cannot agree that it was fair and legal for the plaintiffs, who are money brokers, to put the notes which they had to restore to the defendants, in the hands of another broker, to hawk about the streets of the city for a day or two, and then sell them to a partner of the plaintiffs in the transaction, and by this means fix a measure of damages. The giving countenance to any such principle, would lead to the most pernicious consequences.

It was well understood, when the original agreement was made, that the plaintiffs were to return to the defendants, the same description of notes they had received, and receive the same kind they had given ; the plaintiffs, therefore, had no right to take every thing into their own hands, and by a combination fix the sum the defendants shall pay. The contract between the parties was not one of sale, and, therefore, the rules as to establishing the rate of damages are not applicable.

We will not, on such evidence as is before us, finally settle this controversy ; nor can we be induced to do so, although it is urged that the defendants are now bankrupts, and that if the judgment is reversed, the claim of the plaintiffs will be lost. There is no evidence before us of the bankruptcy, nor any fact that induces the belief that the defendants are not as solvent now, as they were in February, 1842.

The former judgment remains unaltered.

Application of the Mayor of New Orleans, &c., for the widening of Roffignac street.

Application of the MAYOR AND SECOND MUNICIPALITY OF THE CITY OF NEW ORLEANS, for the widening of ROFFIGNAC STREET.

Under the provisions of the act of 3d April, 1832, regulating the opening and improving of streets and public places in the city of New Orleans and its suburbs, the court before which proceedings have been instituted, can, in no case, amend an assessment made by the commissioners. The report must be approved or rejected *in toto*; and in the last case, the court is bound either to appoint new commissioners, or to refer the whole matter back to the same. And on appeal, the supreme court can only pronounce such judgment as should have been given below, either rejecting or approving the report; it has no power to pronounce upon the rights of the parties, from the evidence in the record.

The act of 3d April, 1832, authorizing a municipal corporation to take the property of a citizen for the public use, to be paid for by others supposed to be benefitted thereby, being in derogation of the rights of property, must be strictly pursued.

Under the act of 3d April, 1832, proceedings instituted for the opening or improvement of any street or public place may be discontinued, on the payment of costs, at any time before the final confirmation by the court of the report of the assessors. No rights are acquired, or titles divested, until the assessment has been approved by the court. Nothing in that act repeals the general provision of the Civil Code, art. 489, which declares that private property cannot be taken for public uses, without *previous* indemnity.

APPEAL from the District Court of the First District, *Buchanan, J.*

Rawle, for the petitioners.

Woodruff, pro se, and *R. N. and A. N. Ogden, Lockett and Benjamin*, for the other opponents.

BULLARD, J. This is an appeal by the Second Municipality of the city of New Orleans, and of some proprietors of lots, from a judgment of the District Court, modifying a report of commissioners, appointed for the assessment of damages which would result from the proposed widening of Roffignac street, in pursuance of the act of Assembly of 3d April, 1832, regulating the opening, laying out, and improving of the streets, and public places, in the city of New Orleans.

The proceeding has been pending for many years. Two successive assessments had been made, by different commissioners, which were set aside as unsatisfactory. On the presentation of a third report, oppositions were made, which the court thought

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ought to be sustained; but, instead of setting aside the assessment, and referring the matter back to the same commissioners, or appointing new ones, the court undertook to modify and amend the assessment, and then approved it, as amended. From this judgment, the present appeal was taken.

The court, in our opinion, erred. The third section of the act provides, that any person whose rights are affected by an assessment, may make opposition, and the court may, after hearing any matter which may be specially objected, either confirm the report, or refer the same to the same commissioners, for revisal and correction, or to new commissioners; and so, from time to time, until a report shall be made or returned, which the court shall confirm. It appears to us clear, under these provisions of the statute, that the court can in no case act as commissioners, and amend an assessment, according to the evidence before it. The report must either be approved or rejected, and, in the latter event, the court is bound either to appoint new commissioners, or to refer the matter back to the same. The statute which authorizes a municipal corporation to take the property of one citizen for the public use, to be paid for by others, who, it is supposed, will be benefitted thereby, being in derogation of the rights of property, must be strictly pursued. This view of the case satisfies us, that the judgment must be reversed.

But it has been urged upon the court, that the evidence is all before us, and that we ought to put an end to this protracted contest, by pronouncing upon the rights of the parties. It appears to us manifest, that we can only pronounce such judgment, as, in our opinion, ought to have been given below; and, if the District Court was bound to reject *in toto*, or approve, so are we. The evidence, in our opinion, justified the court in sustaining the opposition of Woodruff, at least.

But the Municipality moved to discontinue these proceedings.

This was strenuously, and successfully opposed by the creditors of Barret & Cannon, whose entire lot had been taken possession of by the Municipality, pending the proceedings, and left open as a part of the street. The attorney of the Municipality still persists in his right to discontinue. It cannot be pretended, that the title to the lot of Barret & Cannon is vested in the Muni-

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city, by virtue of these proceedings. No rights are vested under the act of 1832, until an assessment has been approved by the court: until then, we are not prepared to say, that the corporation has any right to take possession of any property, proposed to be taken for public uses, without the consent of the proprietor. We see nothing in that act which repeals the general provision of the Code, declaring that the property of the citizen cannot be taken for public uses without *previous* indemnity. Whether the act of taking possession, under the circumstances shown in this case, amounts to a consent on the part of the Municipality, to pay for the lots, according to either of the appraisements made, during the course of these proceedings, is a question foreign to the one we are now considering, to wit, whether the Municipality has a right to discontinue, at any time before an assessment has been finally sanctioned by the court.

Our statute is almost a copy of one in New York, regulating the opening and improving of streets. The proceedings are substantially the same. In the execution of that law, it appears to have been uniformly considered, that until a report is finally approved, even after one has been, in part satisfactory, but referred back to commissioners for amendment, no rights are acquired or titles divested. In the case relative to the opening of Anthony street, 20 Wen. 618, the Supreme Court of that State fully recognized this doctrine; and the right of the corporation to discontinue proceedings at any time before the final confirmation of the report, was distinctly admitted. See also, 11 Wend. 154.

It is therefore adjudged and decreed that the judgment of the District Court be reversed; and it is further considered that this proceeding, on the part of the Municipality, be discontinued, on the payment of costs in both courts.

BENJAMIN BUISSON v. HUGH GRANT and others.

The act of 18th March, 1818, creating the offices of Surveyor General and Parish Surveyor, contains nothing indicating an intention to prevent any municipal corporation within a parish, from appointing their own surveyors, or making it the duty of owners of property to employ the surveyors appointed by the State, and no other; and arts. 828, 829 of the Civil Code mainly relate to cases of dispute between adjoining proprietors as to the boundaries between their lands. Although the formalities prescribed by these articles are required to be fulfilled by a sworn officer of the State, for the purpose of fixing permanently the limits of property, it does not follow that a surveyor appointed by a municipal corporation, or any other not commissioned by the State, cannot be employed by a proprietor desirous of having his land surveyed and its limits ascertained; but such survey and fixing of limits, will not have the same binding effect upon his neighbor, as if made by the Parish Surveyor, nor will the *procès verbal* prove itself, or obtain full faith in the courts of this State.

APPEAL from the District Court of the First District, Buchanan, J.

F. Buisson, and R. N. and A. N. Ogden, for the appellant.
Wills and McKinney, for the defendants.

MORPHY, J. This suit was begun by an injunction directed to Hugh Grant, the City Surveyor of the City of Lafayette, prohibiting him from fixing the boundary of any property in any part of the parish of Jefferson. On a rule taken by the defendants, this injunction was subsequently dissolved by the inferior court, on the ground that the petitioner had shown no cause of action entitling him to the remedy prayed for. The plaintiff has appealed.

The petition sets forth in substance, that from January 1832, the plaintiff has been in the possession and enjoyment of all the privileges and rights appertaining to the office of Parish Surveyor for the parish of Jefferson, by virtue of a commission from the Governor and Senate; that by law, there is to be but one surveyor appointed for each parish, and such appointment is to be made by the Governor and Senate; but that the President and Board of Council of Lafayette have illegally appointed another surveyor in the parish of Jefferson, and have passed arbitrary ordinances to impose a fine on the owners of property, who will not have the bounds of their lots fixed by the said surveyor; and that, by

these proceedings of the President and Board of Council of Lafayette, and the acts of the said Hugh Grant under them, the plaintiff is disturbed and obstructed in the enjoyment of his rights, and the performance of his duties as parish surveyor, and has thereby suffered damages, which are laid at \$5000.

The only question which this case presents is whether, the plaintiff has the exclusive right which he claims under his commission as Parish Surveyor, of fixing the limits of land in the parish of Jefferson. The Parish Surveyors have been heretofore considered as having no such exclusive right; for it is well known, that the former Corporation of New Orleans, and the three Municipalities, which succeeded to all its rights within their respective limits, have always appointed their own surveyors; and the plaintiff himself appears to have occupied, for a considerable length of time, the office of City Surveyor in the City of Lafayette. But leaving out of view the general belief and sense of the community on this matter, let us examine whether the pretensions of the petitioner are sanctioned by law. The plaintiff relies on the act of Assembly, approved March 18th, 1818, creating a Surveyor General and Parish Surveyors in the State of Louisiana. This law provides in its first section, that there shall be a surveyor appointed in each parish by the Governor and Senate, and prescribes the oath to be taken, and the bond to be given, by such surveyors. The other sections of the act, which we have attentively examined, treat in detail of the duties to be performed by the Surveyor General, and the several Parish Surveyors. Among other duties, it is required of them to record by order of dates, in a book kept for that purpose, all plats and reports of surveys, and to forward to the Surveyor General, every three months, certified copies of the operations made by them in their respective parishes; and it is provided, that all certified copies of the plats and reports of surveys delivered by them under their hand and seal, shall be entitled to full credit in all the courts of this State. We have been unable to find, in this law, any items of exclusion which go to prevent the Municipal Corporations within any parish, from appointing their own surveyors, or to make it the duty of all owners of property to employ the surveyors appointed by the State, and no other. But this prohibition is

supposed to result from articles 825 and 829 of the Civil Code. The first provides that : " The fixing of new boundaries, or the investigation of old ones may be made extra-judicially and by mutual consent, if the parties are of full age ; but if one of the parties be a minor, or interdicted, it must be done judicially." The other article declares that : " Whether the limits be fixed judicially or extra-judicially, it must be done by a sworn surveyor of this State, who shall be bound to make a *procès verbal* of his work, in the presence of two witnesses called for the purpose, who shall sign the *procès verbal* with him, or mention shall be made therein of the causes which prevented them from signing." These articles, which are to be found in the title of the Civil Code which treats of the action of boundary (*action de bornage*) were, we think, properly considered by the Judge below as relating mainly, to cases where a dispute or difficulty may exist between two or more adjoining proprietors, as to the boundaries or lines of division between their lands. Although it is required that the several formalities prescribed by these articles shall be fulfilled by a sworn officer of the State, for the purpose of fixing permanently the limits of property, it does not follow that a surveyor, not commissioned by the State, cannot be employed by a proprietor desirous of having his lot surveyed, and its limits ascertained. It is true, that such a survey and fixing of limits will not have the same binding force and effect upon his neighbors as if made by the Parish Surveyor, nor will the *procès verbal* prove itself, and obtain full credit in the courts of this State. We consider that the provisions of the Code, and the law of 1818, which are invoked by the plaintiff, only give to the surveys and fixing of boundaries made by the State surveyors a binding effect and authenticity, which the operations of other surveyors have not ; but do not prevent Hugh Grant, or any other surveyor, from making surveys and fixing boundaries when called upon for that purpose. If this view of the law be correct, we cannot see in what way the plaintiff's rights have been invaded, or how he has been disturbed by the appointment of a City Surveyor. This officer, it has been remarked, is appointed for purposes of police ; to superintend the public works ; give the lines of the lots fronting on streets, squares, and other public ways ; fix the level of

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banquets, footways, &c. This is true ; but if called upon by any proprietor to survey a lot and give him his boundaries, he may do it, we apprehend, like any other surveyor ; but his acts would not have any authentic or official character. If the Board of Council of Lafayette have imposed fines to compel the owners of property to employ their surveyor, in cases where the law requires that a sworn surveyor of the State should be employed, they will probably find the means of protecting themselves when called upon to pay the same. Upon the whole, we think with the Judge, *a quo*, that the petition sets forth no legal cause of action.

Judgment affirmed.

**MAUNSEL WHITE and others v. THE COMMISSIONERS OF THE
MERCHANTS BANK OF NEW ORLEANS.**

Where the matters to be investigated are necessarily connected with and incidental to a main action, or a direct consequence of it, proceedings by a rule to show cause, in a summary way, are often convenient and legal ; but such a mode of proceeding will not be permitted to supplant the regular rules of practice, or tolerated when intended to evade the plain provisions of law, by obtaining indirectly, what could not be obtained by a direct action.

The Merchants Bank of New Orleans, having surrendered its charter, under the act of 14th March, 1842, ch. 98, providing for the liquidation of banks, a judgment dissolving the corporation was rendered, commissioners appointed to close its affairs, and all judicial proceedings against it stayed. Plaintiffs having obtained a rule on defendants, to show cause why certain checks drawn by, or on the bank, should not be received by the commissioners in compensation of a debt of plaintiffs to the bank, and the evidence of such debt given up : *Held*, that the act having declared that, in all matters not otherwise provided for, the proceedings for the liquidation of the banks shall be the same as those prescribed in the acts relative to the voluntary surrender of property, and no especial provision having been made, the rule must be discharged.

APPEAL from the District Court of the First District, Buchanan, J.

Barker, for the petitioners.

T. Slidell, for the appellants.

GARLAND, J. The petitioners allege that they are, as the acceptors of a certain draft, or bill of exchange, indebted to the

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Merchants Bank of New Orleans, now in a course of liquidation, in the sum of \$1700, which they aver that they are anxious to pay. They state that they have tendered to the commissioners, in payment, a protested check of the said bank, for \$1500, and a check of Horace Bean & Co. on the said bank for money deposited therein, and standing to their credit, which checks, with interest and damages, amount to more than \$1700. They allege that the Commissioners refuse to receive said checks in payment, unless authorized by the court. It is, therefore, prayed, that a rule may be granted to them, on said Commissioners, to show cause within four days, why the said checks should not be received, and the note ordered to be delivered to the petitioners.

The Commissioners, for answer, state that they are the holders of a draft accepted by the petitioners, which is not yet due. They aver, that the petitioners are not entitled to the relief they ask, and if they are, that they cannot obtain it in this mode of proceeding; and they deny generally the allegations.

The facts are, that on or about the 9th of February, 1842, the Merchants Bank, not being then in liquidation, received from Henry Boyce, his draft on M. White & Co. for \$1700, payable at twelve months, which was accepted. About three months before the draft became due, the acceptors, White & Co., made an arrangement with H. Bean & Co., by which the latter firm, let the former have a protested check of the Merchants Bank of New Orleans, on the Merchants Bank of New York, for \$1500, with interest, damages, and costs, and also a check of said H. Bean & Co. on the former bank, for \$65 32, which it is averred, made up the sum of \$1700. The agreement was, if the checks could be made available in discharging the acceptance, that White & Co. were to pay the amount of them, less a discount of twenty per cent, at the time their acceptance should fall due; but if the checks could not be made available, that Bean & Co. were to take them back. The checks were presented to the Commissioners about three months previous to the maturity of the draft, and its surrender demanded. It was refused, and this proceeding was commenced immediately after.

The District Judge decreed, that compensation should be allowed in favor of petitioners, for the amount of the checks, with

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interest and charges, and the rule was made absolute as to the surrender of the draft; from which judgment the defendants have appealed.

We are of opinion that the judge erred. Supposing, for a moment, that the petitioners are entitled to the compensation they claim, we are of opinion, that they cannot obtain the benefit of it in the form and manner adopted. We have seen for a considerable time past, a system of practice adopted in the courts in this city, by which almost every thing is attempted to be effected by a rule to show cause, in a summary manner. The regular rules of practice established by law, are disregarded, and a short hand system has crept into existence, which is a great abuse, and cannot be otherwise than injurious in its consequences. The causes for which the rule is taken, are generally very indefinitely stated; and it frequently happens, that there are verbal answers given to them, so that it is often difficult, if not impossible, to ascertain what was the object of the parties, and what has been decided. We must express our disapprobation of so loose a system of practice, and our determination to arrest it. There are cases in which rules on parties, and trials in a summary way, may be convenient, legal, and promotive of the ends of justice; but we cannot any longer, permit them to supplant, as they have in a great measure, the regular rules of practice. If the matter intended to be investigated and tried, is necessarily connected with, and incidental to the main action, or a direct consequence of it, the proceeding by rule, in a summary manner, is often convenient and legal; but such mode of proceeding cannot be tolerated, when it is intended to evade the plain provisions of law.

The suit on which it is attempted to engraft the rule now before us, was commenced under an act of the Legislature, relative to the liquidation of the banks in this State. Acts 1842, p. 234. Under it, the stockholders of the Merchants Bank surrendered their charter, and Commissioners have been appointed to close the concern. A judgment decreeing a forfeiture has been rendered; and, according to the 8th section of the act, (p. 236, 238,) all judicial proceedings against the bank are arrested. The 18th section (p. 244,) directs a tableau of distribution of the funds on hand, to be made among the creditors, from time to time, according to their

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ranks and privileges; and the 24th section says, that in all matters not otherwise specially provided, the powers, duties, and liabilities of the Commissioners shall be the same as those conferred on syndics of insolvent estates, and the proceedings the same as those provided by the acts in force, relative to voluntary surrenders of property. (Acts 1842, p. 246.)

The counsel for the plaintiffs admits, that they cannot bring an ordinary suit against the Commissioners to recover the amount of the checks in question, but contends, that by this rule he can compel them to give the plaintiffs the benefit of them in as effectual a manner, as though he had a judgment for the sum he claims. The consequence of sustaining this rule, would be, to enable the applicants for it to obtain that indirectly, which they cannot do directly.

The judgment of the District Court is therefore annulled and reversed, and the case dismissed, with costs in both courts.

SUCCESSION OF JAMES DEVINE—LOUIS JOSEPH PECQUET,
Appellant.

The privilege of the lessor on the moveables found in the house, yields to that for the funeral expenses of the debtor and family, where there is no other source from which they can be paid; but it must be placed on the tableau of distribution immediately after such expenses.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.* This succession consisted of moveables, which were, at the opening of the succession, in the house leased by the opponent, Louis Joseph Pecquet, to the deceased. Pecquet has appealed from the judgment of the Probate Court placing his privileged claim next after "the funeral and law charges."

Bodin, for the appellant.

Train, for the curator.

MARTIN, J. Louis Joseph Pecquet is appellant from a judgment overruling his opposition to the tableau of distribution, in which his claim for rent arrear is placed after the general law charges of the succession, while he contends that it ought to come

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immediately after the funeral charges. His counsel has relied on the case of *Garretson v. His Creditors*, (1 Robinson, 445,) and *Montilly v. His Creditors*, (2 Robinson, 350,) decided in March and June, 1842, which fully support him.

It is therefore ordered, that the judgment of the Court of Probates be reversed, as far as it relates to the rank of the opposing creditor, and the tableau amended by placing his claim immediately after the funeral charges; the costs of the appeal, and those of the court below, to be borne by the estate.

ROBERT FEARN v. CHARLES TIERNAN.

When a partnership has been once formed, no third person can be subsequently admitted into the firm, without the concurrence of all the original members. One attempted to be admitted otherwise, becomes only the partner of him who attempts to admit him.

The publication in a newspaper by a third person, that he is a member of a commercial partnership, cannot be considered as an act emanating from any of the partners and giving credit to such person, unless knowledge of the publication be brought home to the partner sought to be charged. To render the latter responsible for the acts of such third person, it must be proved that credit was given to the partner, and that he tacitly acquiesced therein. Nor will the payment by the firm of acceptances by such third person made in their name, prove any thing against such partner, where it is shown that he was absent from the place of business of the firm until after its dissolution.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* This was an action against Charles Tiernan, a member of the commercial firm of Tiernan, Cuddy & Co., on a bill of exchange, alleged to have been accepted by the latter. The acceptance was in the hand-writing of one Keyes. The defendant denied that the acceptance was made by any member of the firm, or any one authorized to accept in their name. The case turned upon the question whether Keyes was a partner. The court below was of opinion, that the evidence did not establish that Keyes had been admitted as such to the knowledge of the defendant, and from a judgment in favor of the latter, the plaintiff has appealed. *Anderson*, for the appellants.

G. Strawbridge, for the defendant. A member of a commercial firm cannot, without the consent and knowledge of his co-partners, admit a stranger into the partnership. Knowledge and acquiescence in the acts of the person so intended to be admitted as a partner must be clearly brought home to all the partners associated, in order to bind the firm. The approbation of the managing partner alone does not suffice. C. C. 2842. C. Nap. 1861. Poth. Contrat de Société, No. 91 to 95. Gow on Partnership. 5. *Murray v. Bogert et al.*, 14 Johnson's Rep. 318. "*Socii mei socius, socius meus non est.*" Dig. Lib. 50, t. 17, l. 47. De Reg. Juris.

BULLARD, J. The plaintiff sues as holder of a bill of exchange accepted by Tiernan, Cuddy & Co., alleging that the firm, at the time of the acceptance, was composed of Luke Tiernan, Charles Tiernan, J. McGilly Cuddy, and Calvin Tate. In an amended petition he alleges that the acceptance of the bills was in the proper hand-writing of Washington Keyes, who, at that time, had full authority to do so, being either a partner, or an agent of said firm, duly authorized to make acceptances, and that he accepted either as partner or agent.

The acceptance of the bill by Keyes is not contested; and the question presented for our solution on the appeal is, whether Charles Tiernan, one of the partners who resided in Baltimore, be bound by the acceptance, or, in other words, whether Keyes was a partner, so far as it concerned the liability of Tiernan.

It is certain that Keyes was not originally a partner; and there is no direct and positive evidence that Charles Tiernan consented to his admission into the firm. It appears that he lived in North Alabama, published anonymously in a newspaper, that he was a partner of the house of Tiernan, Cuddy & Co., and transacted some business in the name of the house, and, among other transactions accepted the bill of exchange sued on. There was a general impression that he was a partner of the house.

It is too well settled to require any comment, that when a partnership is once formed, no third person can be afterwards admitted or introduced into the firm as a partner, without the concurrence of all the partners, who compose the original firm. The new partner becomes the partner of him alone who admitted him.

"*Qui admittitur socius, ei tantum socius est qui admisit; et recte; cum enim societas consensu contrahitur, socius mihi esse non potest quem ego socium esse nolui.*" Digest, Lib. 17, Tit. 2, 1, 19. Story on Partnership, 6. Pothier, Traité de Société, 67, No. 91.

The consent then of Charles Tiernan, either express or implied, must be shown to the connection of Keyes with the house. It is not pretended that there was any express assent, but it is attempted to infer consent from several facts and circumstances; among others it is said, that Keyes published to the world his association with the firm, and it was not contradicted by Charles Tiernan. To this it is answered, that the notice was at an obscure place in the interior of Alabama, was anonymous, and the paper is not shown to have been seen by Tiernan, who resided in Baltimore. Unless notice be brought home to Tiernan, this cannot be said to be an act emanating from him and giving credit to Keyes, which would bind him as a partner. Let us suppose that instead of proclaiming himself the partner of Tiernan, Cuddy & Co., he had given notice that he was associated in business with Charles Tiernan of Baltimore, alone, and in that manner had accepted bills; surely those who dealt with him without further inquiry, could not render Tiernan accountable as a partner; something must be shown to prove that credit had been given to Tiernan, and that he tacitly acquiesced in that course of business.

Other acceptances by Keyes, in the name of the firm, were paid by them in New Orleans; but it is shown that Charles Tiernan never was here until after the house had failed. The payments were made by his partners, and prove nothing against him.

A letter was read in evidence from Keyes to Luke Tiernan & Son, in Baltimore, in which he appears to have *defined his position* in regard to the house of Tiernan, Cuddy & Co. He appears to write to them as strangers. He says: "My association, as you *perhaps* have been informed, with the house of Tiernan, Cuddy & Co., extended only to the business and cotton consignments from the States of Alabama and Tennessee. I was not to have an interest in or assume responsibilities for any other transactions, and in this to be protected from any loss or responsibility that would reduce my part of the profits or salary, which they agreed

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to pay, below \$3000 per annum." He goes on to complain that at the earnest request of the house in New Orleans, he had involved himself deeply, and applies for relief.

There is another letter from Keyes to Charles Tiernan, which appears to be an answer to one from the latter, of the 18th March, 1837. After excusing himself from returning to New Orleans, he continues: "Besides I do not consider myself a mutual partner in the house of Tiernan, Cuddy & Co., or at all interested in its profits or loss, or in any settlements between the partners of that firm, except only as a creditor of the house. It is now considerably my debtor. The partnership that existed between Tiernan, Cuddy & Co., and myself, was, as you must know, a very limited one, and by the agreement founded upon a contingency. This I presume will be seen by examining the article which also guaranties to me a salary of \$3000 per annum; &c."

It is further shown, that when Charles Tiernan afterwards sued to put an end to the partnership, he alleged as one ground that his partners had, without his consent, taken in Keyes as a partner in the firm.

Upon a view of the whole case we concur with the court below, that the plaintiff has not produced sufficient evidence of the consent of Tiernan, to render him liable.

Judgment affirmed.

THEODORE BAILLY BLANCHARD, Executor, v. HENRY LOCKETT.

Action by the executor for the price of one-third of a certain lot purchased by defendant, at the probate sale of the property of the deceased; the petition alleging, that the lot belonged jointly and equally to the deceased, the defendant, and a third person, though the title was in the name of defendant; and, that it was sold at the sale of the succession by consent of all parties. Answer, that though it appeared by a counter-letter, that he, defendant, owned only one-third; that he purchased from the deceased, and was to sell the same, and account to the deceased and the third joint proprietor, each for one-third, yet that a fourth party had been a joint owner with the deceased; that he, defendant, had endorsed notes to enable the deceased to purchase the interest of such fourth party, which he, defendant, had, after renewal, to pay, owing to the insolvency of the deceased; and that the title to the

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whole lot was made to him by deceased, to secure him against his endorsement, and the counter-letter executed by him, in consequence. Plaintiff having produced, under a rule taken on him, the original notes drawn by the deceased and endorsed by defendant, the books of the deceased, and other memoranda in his possession relative to the sale, a counter-letter between the deceased and the fourth party, showing the interest of the latter, and their accounts with each other; defendant offered them in evidence to sustain the allegations of his answer. Plaintiff objected to their being received, on the ground that the notes were not mentioned in the counter-letter signed by defendant. *Per curiam*: Though the counter-letter does not speak of the notes, or of the interest of such fourth party, evidence is admissible to prove such interest, when it consists of other written documents in the possession of the deceased. Such documents do not contradict the counter-letter, but show another contract connected with the first, in relation to the same transaction, in which all were partners. Nor can the evidence be excluded on the ground that the defendant, sued as a purchaser at the sale of the succession, cannot plead in compensation, a debt due to him by the deceased. It is clearly not a question of compensation in the ordinary sense of the word.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Grima*, for the plaintiff, cited *Green v. Davis et al.*, 7 Mart. N. S. 238, to show that the purchaser of the property of a succession cannot offer in compensation, a debt due to him by the deceased.

Micou, for the appellant.

BULLARD, J. This action is instituted by the executor of the last will of Theodore Nicolet, against Henry Lockett, to recover from him, one-third of the price of a city lot, purchased by him at the probate sale of the property of the estate, which lot, it is alleged, belonged jointly to Nicolet, Merle, and the defendant Lockett, although the title stood in the name of the latter alone, and was sold by consent of all concerned at the public sale of the property of the estate.

The defence set up is; that although it appears by a counter-letter that he was the ostensible owner of the whole lot, whereas he owned only one-third, and was to sell the property and account to Merle and Nicolet, each for one-third; and that he acquired his title from Nicolet; yet one Jules Le Blanc had been, in fact, a joint owner thereof. That, during the negotiation for the sale of the property, Nicolet represented to him, that, in order to extinguish the interest of Le Blanc, it was necessary for him to procure the sum of \$10,000, in addition to the sum to be paid

by Merle and the defendant, which sum, the situation of his affairs required, should be otherwise appropriated. That it was thereupon agreed, at the instance of Nicolet, that the defendant should receive the notes of said Nicolet for \$10,000, endorse them, procure their discount, and deliver the proceeds to Nicolet, to enable him to pay for the interest of Le Blanc in the property. That, in pursuance of this agreement, the notes were drawn, endorsed, and discounted, and the proceeds paid to Le Blanc to extinguish his title. That, therefore, the title to the whole property was made by Nicolet to the defendant Lockett, for his security, and the counter-letter was given. That, the notes, the act of sale, and the counter-letter were, and are only parts of one and the same contract, and that Nicolet, in fact, had no interest since the third thus purchased of Le Blanc was paid with the money thus raised and advanced. That Nicolet engaged to pay the endorsed notes at maturity, and thus relieve the defendant as endorser; and that in reliance upon said promise he signed the counter-letter. Defendant avers, that, in consequence of the insolvency of Nicolet, he was compelled to pay the notes endorsed by him, and did pay two notes, to wit, one for \$2400, being one of those originally given, and one for \$4500, being the first renewal of one for \$5000; and the notes thus alleged to have been paid are annexed to the answer. The defendant then alleges, that he contributed \$6900 in addition to the \$10,000 already paid by him, and that he had a corresponding interest therein.

On the trial of the cause, the plaintiff was ruled to produce: 1st. The original notes, amounting together to \$10,000, drawn by Nicolet & Co., and endorsed by Lockett, about the month of March, 1837. 2d. The bill book of Nicolet & Co., in which the notes were entered. 3d. The cash book of Nicolet & Co., in which the proceeds of the notes were credited. 4th. All the entries and memoranda respecting the sale of the property described in the petition, and the notes, and the book of accounts, in which the same are entered. 5th. The counter-letter between Jules Le Blanc and Nicolet, showing the interest of Le Blanc in the property. 6th. The account of Le Blanc with Nicolet & Co., embracing the period between the 1st March, 1837, and the death of Nicolet.

The books, notes, and accounts with Le Blanc, having been produced on this call, the defendant offered them in evidence to prove that Le Blanc received a large portion of the price of the property sold by Nicolet to the defendant. That no other notes of Nicolet were endorsed by the defendant, save those annexed to his answer, and those, in renewal of which, the same were given. That the notes annexed to the defendant's answer originated in, and were connected with the adventure or speculation mentioned in the counter-letter. This evidence was objected to by the plaintiff, on the ground that no mention of such notes was made in the counter-letter; and the court refused to admit the evidence, because the defendant, who was sued as purchaser of a property of the succession of Nicolet, cannot offer in compensation a debt due him by said Nicolet deceased. To this ruling of the court the defendant took a bill of exceptions.

The ground upon which the Judge excluded the evidence, does not appear to us tenable. This is clearly, not a question of compensation, in the ordinary acceptation of the word. If Lockett had carried out the original intention of the parties, by selling the property himself, instead of consenting to the sale with the property of Nicolet's estate, it is clear, that he would have been accountable to his associates for the proceeds. In the settlement among themselves, of the mutual claims of the partners against each other, he would have been authorized to charge each with what he had really disbursed for his benefit, in relation to the object of their speculation or adventure. The balance in his hands, after making such deduction, would have formed the fund to be divided. It is worthy of inquiry, whether he has lost this right, by consenting to a sale under the authority of the Court of Probates, and becoming himself the purchaser.

The objection made by the counsel is more specious than solid. It is true, the counter-letter does not speak of such notes, or of any interest of Le Blanc. But evidence to show that such was the fact, when that evidence results from other written documents in the possession of Nicolet, does not contradict the counter-letter, but shows another contract, connected with the first, in relation to the same transaction, in which all were partners. Without expressing any opinion as to the effect which such evi-

dence would produce, and whether it would exonerate Lockett from paying one-third of the price at which it was adjudicated to him; we think that the evidence was admissible. It tended to show equities between the parties before the death of Nicolet; and his creditors had, perhaps, a right, as it relates to Lockett, only to the nett proceeds of that speculation. It was, therefore, proper to inquire, whether, in truth, Lockett had paid more than his proportion of the price.

It is therefore adjudged and decreed, that the judgment of the Parish Court be reversed, and, that the case be remanded for a new trial, with instructions to the judge not to reject the evidence offered, on the ground set forth in the bill of exceptions; and that the costs of the appeal be paid by the appellee.

JAMES P. McWILLIAMS v. JOHN HAGAN.

In the absence of any privity between plaintiff and defendant, a very strong case must be made out to justify the application of the maxim, that no man should be permitted to enrich himself at the expense of another, as a ground of recovery. Even among those who have dealt with each other, one may sometimes receive the benefit of the labor or expense of another without being bound to pay for it, as where a tenant has made improvements without authority from his lessor.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MORPHY, J. The petitioner seeks to recover of the defendant, \$707 56, for work and labor done for the Union Cotton Press, in storing and arranging cotton during the months of October, November, and December, 1840. He alleges that the work was done by the order of Messrs. Huie & Hale, then in possession of and working said press, and that he received from them their *bons*, or due bills, for that amount; that during the whole of this time, the defendant had the legal title to the property, and that Huie & Hale, were in possession under him, in pursuance of private arrangements between them, and that they continued in possession until the 22d of December, 1840. The petitioner further alleges, that the cotton so stored by him, was still at the press

when the defendant took possession thereof from Huie & Hale, and that he thus procured to himself all the benefit of the work and labor performed by plaintiff. The defendant pleaded the general issue, averring that if plaintiff performed the work, he must look to those who employed him, he, defendant, never having derived the slightest advantage therefrom. There was a judgment below in favor of plaintiff, from which the defendant has appealed.

The evidence shows that John Hagan, who became the purchaser of the Union Cotton Press, on the 27th of October, 1840, at a Sheriff's sale, made at his own suit, agreed with Huie & Hale, the former owners, that he would leave them in possession, and would reconvey the press to them, upon their giving him some additional security within a specified time. That Huie & Hale, having failed to comply with this agreement, Hagan sold the property to Alfred Penn, who took possession of it on the 22d of December following. That during this time, Huie & Hale received all the profits of the press, employed plaintiff to arrange and store cotton, and gave him, now and then, due bills, some of which they have paid; and that, at the time Huie & Hale were ejected, there remained in the press, from 8,000 to 10,000 bales of cotton arranged and stored by the plaintiff. Alfred Penn, the purchaser of the press, testified, that when he bought from Hagan, he took into view the cotton stored in the press, and gave more for it on that account; and that it is customary for cotton, pressers to pay for the drayage, storing, and arranging of cotton in order to secure the preference in compressing it. An admission in the record shows, that Huie & Hale, while they were working the press, paid a sum of \$3000 to the defendant. It is not mentioned on what account this sum was paid, but it appears probable that it was for their use and enjoyment of the press.

Under these facts, which show no privity whatever between the plaintiff and defendant, we cannot see any legal ground on which the former can recover. He was employed by Huie & Hale, while they were working the press for their own benefit, and advantage, and on their own account. He made settlements with them from time to time, and received their *bons*, trusting and looking to them for payment. Without showing any effort to re-

cover from his employers, or establishing their insolvency, he now contends, that the defendant, as the owner of the press, is liable for these *bons*, because he has, it is said, received the benefit of the labor performed by him, at the press. Even if this circumstance could in any case, be considered as a sufficient ground to recover, the benefit alleged to have been received by Hagan, from the plaintiff's labor, is by no means so apparent. Penn says, to be sure, that the cotton stored in the press was taken by him into view when he purchased, on account of the profits which might be derived from the compressing of it; but it is not shown that the fact of the cotton being stored in the press, was known to the defendant, or was considered at all by him in the bargain. He might not, perhaps, have consented to sell the property for a dollar less than the price he received, had there been no cotton stored in it. The profits expected to be derived from the compressing of the cotton were uncertain, and contingent, as the cotton might have been shipped, as it frequently is, without being compressed. In the absence of any privity, a very strong case indeed must be made out, to justify the application of the maxim, that no man should be permitted to enrich himself at the expense of another, as a ground of recovery. Even among persons who have had dealings with each other, one of them may sometimes receive the benefit of the labor or expense made by the other, without being bound to pay for it. The owner of a house, for instance, is not bound to pay for improvements which it may have suited the interest or convenience of a lessee to make, if unauthorized by him, although such improvements may have enhanced the value of the property. Were it otherwise, a maxim so replete in itself, with natural equity, might lead to the greatest injustice. In the present case, we are of opinion, that the plaintiff must look for remuneration to those who employed him, and that he cannot seek payment from one who did not order his services, and who is not even clearly shown to have been benefited by them.

It is therefore ordered that the judgment of the Commercial Court be reversed, and that ours be for the defendant, with costs in both courts.

Bradford, for the plaintiff.

C. M. Jones, for the appellant.

EMILE BARTHE v. ELISÉE LÉON BERNARD, Agent.

No appeal will lie to the Supreme Court from any decision of the Presiding Judge of the City Court of New Orleans, in a case originally instituted before an Associate Judge of that court.

APPEAL from the City Court of New Orleans, *Duvigneaud, J. Barthe, pro se.*

Bodin and J. Seghers, for the appellant.

MARTIN, J. During March, 1841, Bernard, agent of Boismagny, obtained a rule on the Presiding Judge of the City Court, to show cause why a *mandamus* should not issue, commanding him to grant an appeal to the applicant, from a judgment obtained by Barthe, affirming eight judgments, rendered by an Associate Justice, against the applicant. The Judge having shown cause, the rule was discharged in April following. A few days after, we reconsidered our decision and made the rule absolute, but declared that we would listen to the appellee upon the question of the jurisdiction of this court, if he thought fit to urge a plea thereto. The Presiding Judge has granted the appeal, and the appellee has urged the plea to our jurisdiction. The plea must be sustained: 1st. On the ground, on which we discharged the rule, to wit, that appeals from the judgments of an Associate Justice, must terminate in the court of the Presiding Judge. 2d. That the eight judgments of sixty dollars each, not having been consolidated, there is not a judgment for four hundred and eighty dollars, as urged by the appellant, but eight several ones for a sum below that on which a resort for relief may be had to us.

Appeal dismissed.

THE INHABITANTS OF THE PARISH OF NEW ORLEANS v. CHARLES
F. HOZEY, late Sheriff, and others.

APPEAL from the Commercial Court of New Orleans, *Watts, J. MORPHY, J.* This case was before us last year on the appeal of several of the sureties of Hozey. 2 Robinson, 552. Another of the sureties, J. M. Bach, and the Ex-Sheriff, have now appealed, and we are called upon to examine the judgment below as it concerns them. The same reasoning which led to the reversal of the judgment against the other sureties applies equally to Bach, and the same result must follow. The counsel for the Ex-Sheriff insisted that the exception taken by him to the appointment of a judicial sequestrator, ought to have prevailed. Whatever may have been our opinion of the propriety of granting a sequestration in the case, so far as it concerns the other creditors of Hozey, we think he has no just right to complain. The showing made by the plaintiffs was such, as made it proper to resort to such a conservatory measure to protect the rights of the Parish Treasury. Judgment was finally rendered against Hozey, for \$8873 36, arrearages of parish taxes; for \$3000, for taxes on suits; and for \$1485, for amount of fines, making in all \$13,358 06. We shall proceed to consider this judgment by examining separately the three items of the plaintiff's claim against the late sheriff.

I. The Judge properly allowed a credit for the amount of tax receipts acknowledged by F. Buisson, the sequestrator, to be in his possession, and reduced the amount claimed on this head to \$8873 06

But he entirely overlooked an admission to be found both in the petition and account annexed to it, that Hozey had paid them on account. . . . \$4978 25

To this credit must be added several bills paid by him and chargeable to the parish, amounting together to 993 00 5985 25

Thus reducing the amount due for parish taxes to \$2868 81

Inhabitants of New Orleans v. Hozey, late Sheriff, and others.

II. The item of \$1485, for fines imposed on jurors in the Parish Court, is unsupported by any legal evidence. Annexed to the petition, and signed by the Parish Treasurer, is a statement of fines to that amount, said to have been made out according to lists transmitted to the Treasurer by the Clerk of the court; but on the trial below no evidence was offered to show that either of the lists required by law, was ever certified by the Clerk and transmitted to the Sheriff and the Treasurer. No warrant, or certified statement of the fines appears to have been placed in the hands of the Sheriff which could enable him to collect them; nor have the plaintiffs produced the voucher, which was necessary to prosecute that officer. B. & C.'s Dig. 779 and 780.

III. Of the amount claimed for taxes on suits in the first Judicial District Court, the Parish Court, and the Commercial Court, the Judge has allowed only \$3000, and the plaintiffs have not prayed that the judgment be amended on this head. As no evidence was adduced on the trial that any lists or statements of these taxes, certified by the clerks of these courts, were ever furnished to the Sheriff, the Judge, we apprehend, made this allowance on the testimony of the late Sheriff's deputy, who testified that Hozey used every exertion to have the taxes on suits collected, but could not recover more than \$3000. But this witness, in another part of the record, furnished in writing a more definite statement of these collections, and put them down at the precise sum of \$2285 00

This statement also shows that the actual amount paid out by Hozey, in the salaries of Judges, and in the expenses of the courts, chargeable by law upon this fund, and proved by proper vouchers in the record, is

Leaving only a balance of	\$201 50
Which being added to the unpaid amount of Parish taxes	2868 81

Makes the sum of

For which only judgment must be given.

It is therefore ordered, that the judgment of the Commercial Court be reversed; that as relates to the surety J. M. Bach, there be a judgment for him as in case of nonsuit, with costs in both

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courts ; and that the plaintiffs do recover from Charles F. Hozey, three thousand and seventy dollars and thirty-one cents, with costs below, those of this appeal to be borne by the appellees.

Morel and Eyma, for the plaintiffs.

Lockett and Micou, for the appellants.

BENJAMIN C. CLARK and another v. PETER LAIDLAW.

Where the record contains no statement of facts, bill of exceptions, or assignment of errors, and it appears from a certificate of the clerk on the return of a *certiorari* that the evidence of a witness examined below, not taken down in writing, cannot be included in the record, the appeal must be dismissed.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

Lockett and Micou, for the plaintiffs, moved to dismiss this appeal on the ground that the certificate of the Clerk of the court below, showed that the testimony of a witness examined on the trial had not been reduced to writing, and could not be included in the record ; there being no statement of facts, bill of exceptions or assignment of errors.

Carter, for the appellant.

MARTIN, J. The plaintiffs and appellees discovered that the testimony of Bedford, a witness examined below, was not in the transcript ; the appellant obtained a *certiorari*, on which the Clerk returned that the testimony had not been reduced to writing. The record shows that the judgment was given partly on the testimony of Bedford, which does not appear to have been transcribed, although the Clerk certified that he was sworn and examined. The Judge, however, has certified that the record contains, "all the evidence adduced by the parties." The plaintiffs, on this have demanded the dismissal of the appeal. Those who seek relief at our hands must take care to bring before us all the evidence given below. If they do not, we cannot review the judgment they complain of.

Appeal dismissed.

Ledoux and another v. Armor.

AMARON LEDOUX and another v. JAMES ARMOR.

Where several things sold together, *e. g.* so many coils of bale rope, are independent of each other, not forming a whole, and their value is not increased by their union, a redhibitory action will lie only for the things found defective, and the contract must be carried into effect as to the rest. Such is the clear inference from art. 2518 of the Civil Code.

In the absence of any expression of legislative will, proof of its being the commercial custom of a particular place as to certain articles, to take back the whole lot sold, and to restore the price on the discovery of any portion being defective, would be entitled to some weight, if shown to have existed long enough to have become generally known, and to warrant the presumption that contracts were made in relation to it; but where the law has provided a rule, no customs of any set of men can have a force paramount to the law.

Pending an action for the rescission of a sale, vendees sold the article which was the subject of the contract, without the consent of defendant, or any order of court. *Held*, that the return of the thing sold is indispensable to a recovery in any redhibitory action, and that by such sale the plaintiffs disabled themselves from recovering.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. Plaintiffs purchased from the defendant a number of coils of bale rope, a part of which proving to be of an inferior quality, or materially damaged, they instituted the present action to obtain a rescission of the sale; and the only question presented by the record is, whether, in consequence of the bad quality of a part of the coils, the vendees have a right to rescind the whole contract. The judge below thought not, and from his decision the plaintiffs have appealed.

L. Janin, for the appellants. The evidence offered by plaintiffs to prove the commercial usage of New Orleans, in regard to sales of bale rope, should have been received. 2 Troplong, Vente, p. 11, no. 549. "*Un marchand qui achète des pièces de siamoise (nankin) peut ensuite faire annuler son marché, s'il y découvre des vices lors de l'aunage.*" Dalloz, Dictionnaire, vol. 3, p. 9. no. 292. In 3 Rawle, 101, it was held that evidence was admissible to prove that by custom or usage in Philadelphia, the seller of cotton is answerable to the buyer for any latent defect, though there be neither fraud nor warranty. In this case, a part of a lot of fifty bales of cotton was damaged, and the whole sale was re-

scinded. In doubtful cases, proof of usage should be admitted. "*Si les usages sont contradictoire on doit décider en faveur du débiteur.*" 3 Dalloz, Dictionn. p. 490, No. 722. 6 Toullier, No. 319. The sale was by sample; and the defects are not apparent ones. "*Dans une foule de cas,*" says Duranton, vol. 16, p. 339, "*un vice peut être apparent par lui-même, et cependant, à raison de telle ou telle circonstance, il est possible qu'il n'ait pu être connu de l'acheteur. Tel serait le cas où la chose n'était pas sous ses yeux au moment du contrat; tel est le cas aussi où elle était dans un magasin fort obscur, ou placée sous d'autres marchandises, ce qui ne permettait pas à l'acheteur de l'examiner commodément et sous toutes ses faces, achetant ainsi de confiance.*" No article of merchandize is more analogous to that which gave rise to this contest, than cotton in bales; and in the case of *Boorman v. Jenkins*, 12 Wendell, 246, it was held, that every sale of packed cotton is, by usage, a sale by sample, and *per se* a warranty, and the rule *caveat emptor* does not apply.

Cooley, on the same side, to show that the lower court erred in rejecting evidence of the custom, cited, Civil Code, arts. 1897, 1958, 1959, 1961. 16 Duranton, No. 529. Journal du Palais, vol. 20, p. 954. (Cour Royale de Caen, 22 Nov. 1826.) Plaintiffs would not have purchased at all, had they been aware that the defects existed; the sale should, consequently, be rescinded. Civ. Code, arts. 2496, 2497, 2507, 2509. *Williams v. Miller*, 9 La. 132. It must be rescinded *in toto*. Civil Code, arts. 2518, 2521, 2487. Journal du Palais, vol. 5, no. 506. Merlin, D. de J. verbo Redhibitoire, No. 11. The defects in the rope were not apparent. Civ. Code, art. 2497. 16 Duranton, 310, and *Miller v. Williams*, cited above.

L. Peirce, for the defendant, contended that the sale could, under no circumstances, be entirely rescinded. Civil Code, art. 2518.

C. M. Jones and Benjamin, for the parties cited in warranty.

MORPHY, J. The petitioners seek to rescind the sale of 401 coils of bale rope, which they bought of the defendant on the 2d of September, 1840, at the rate of twelve and one-half cents per pound, making a sum of \$5,872 62, for which they gave their two promissory notes of \$2,936 31 each, payable four months after

date. They represent, in substance, that the rope was bought upon a sample of it left by the defendant at the store of Layet & Amelung, his agents. That shortly after their purchase, they sent a few coils of this rope to some of their friends and customers in the country, but that the same was immediately returned to them as being of bad quality, and too defective for the purpose for which it was intended, to wit, the baling of cotton. That they then had some of this rope tried in various cotton presses, after giving the defendant notice thereof, and that it was found, both by the trial at the cotton presses, and by separately opening and examining many coils, that notwithstanding its deceptive appearance, nearly the whole of this rope was either twice laid, rotten, or otherwise damaged, and so packed as to conceal as much as possible its defects. They further represent, that the defects of this rope were not apparent, and that owing to the nature of the article, and the manner of packing it, it is neither customary nor practicable, to institute such a minute inquiry on the purchase of a large lot of bale rope, as will bring such defects to light, and that by the mercantile custom of New Orleans, the sale of a parcel of that article is considered as null and void, if a large proportion, though not the whole of it, be of bad quality; that in September last, they offered to return the whole lot of this rope to the defendant, and claimed of him the restitution of their notes, but that he refused so to do; and that since then, to wit, on the 5th of January ensuing, they were obliged to pay one of their notes which had been negotiated by the defendant, but that the other one is still under protest in his hands. They pray that the sale of the rope may be rescinded, and that Armor be decreed to return to them their unpaid note of \$2,936 31, and to reimburse to them an equal amount for the note paid by them, with interest, &c. The defendant admitted the sale, but denied all the other allegations of the petition. He further averred that he had himself, purchased the rope from Samuel Bell and A. H. Wallace & Co., and called them in warranty. He moreover claimed in re-convention, the payment of the note of \$2936 31, still in his possession. The warrantors pleaded the general issue. The Judge below being of opinion that the petitioners were not entitled to a rescission of the whole contract, and not finding the evidence such

as to enable him to pronounce satisfactorily upon their rights, decreed that the plaintiffs should pay to the defendant, the sum claimed in reconvention, but reserved to them their claim for a rescission of the contract, or a diminution of the price on such portion of the rope as may be proved to be unmerchantable. A motion for a new trial was made by the plaintiffs, during the pendency of which they caused all the rope, which they had kept until then in their store, to be sold at auction, after giving notice of the sale to the defendant and warrantors. The parties then appear to have submitted the cause anew to the judge, to be finally adjudicated upon, after having introduced some additional evidence in relation to the sale which had taken place. The judge, thereupon, allowed the plaintiffs a reduction of the price, which being found insufficient, this appeal was taken.

The evidence adduced, on the first hearing of this cause below, clearly established that a considerable portion of the rope which the plaintiffs had purchased, was of bad quality, and some of it altogether unfit for the purpose for which it was intended; but it also showed that the lot contained a quantity, not exactly ascertained, of good and merchantable rope. Had the plaintiffs separated the sound rope from that which was defective, and confined their claim for redhibition, or a reduction of the price, to that portion of the goods which as unmerchantable, they would have had no difficulty in their way. The record even shows, that had they not misconceived the extent of their legal rights, they might have obtained justice, without engaging in the long and unprofitable litigation which has brought them before us. Upon their first complaint to the defendant, Samuel Bell, who had sold to the latter 268 coils of the rope, offered to exchange good rope for an equal quantity of any sold by him that would be pronounced by a competent judge of the article, not to be sound rope. But the plaintiffs, conceiving that they had a right to insist upon a rescission of the whole purchase, instituted in the Parish Court, in September, 1840, a redhibitory suit which they discontinued several months after; and then brought the present action, in which they again contend for the rescission of the sale *in toto*. The main question then, and perhaps the only one which this case presents, is, whether in consequence of the bad quality of a certain number

of the coils of rope by them purchased, they are entitled to have the whole contract annulled. Our law is explicit on this subject. It provides, (Civil Code, art. 2518,) that "the redhibitory vice of one of several things sold together gives rise to the redhibition of all, if the things were matched, as a pair of horses, or a yoke of oxen." From this provision the inference is clear that if the several things sold together are independent of each other, and do not form a whole, and if the value of each thing is not increased by its union with the rest, a redhibitory action can be maintained only for those things which are found defective, and that the contract must stand and be carried into effect in relation to the others. 6 Mart. 696. 3 Ib. N. S. 100. Pothier, *De la Vente*, Nos. 226, 227, 228. But it is said, that there exists a custom, or commercial usage in New Orleans, which authorizes the purchaser of a large quantity of rope to return the whole parcel to the seller and receive back his money, if he discovers that a part of it is defective. In the absence of any expression of legislative will on the subject, such a custom or usage would have been entitled to some weight, provided it had existed a sufficient length of time to have become generally known, and to warrant the presumption that contracts were made in relation to it. But where the law is express, no man or set of men can create a custom for their own benefit or convenience, and give to that custom a force paramount to that of the law. 12 Mart. 26. 6 Ib. N. S. 528. 567. 3 La. 394. 7 La. 528. The Judge, therefore, properly refused to hear testimony tending to show the prevalence of any such commercial usage. The custom is said to have sprung from the impossibility of distinguishing the good from the bad rope in the purchase of a large lot, by reason of the deceptive appearance of the article. This may be true, on the cursory examination usually made at the time of a sale, especially when samples are exhibited. But if, after the purchase it is discovered, that there are in the lot some portions defective and unmerchantable, we cannot believe it impossible, or even very difficult, upon a close inspection, to separate the good rope from the bad; and the testimony in this very case shows that it is in no wise impracticable. More than one year after the sale to the plaintiffs, Taylor and Jonau, two of their witnesses, examined every coil of the rope separately, and found that there was rope of three quali-

ties, 77 coils of good merchantable rope, 48 coils doubtful, and 250 coils of bad rope. Had the plaintiffs given evidence of the value of the damaged rope, made an actual separation of the good from the bad, and proved the weight of the bale, the judge below could have either annulled the sale of the defective coils, or allowed a reduction of the price according to the evidence; but, pertinaciously insisting upon a rescission of the whole contract, they thought it sufficient for their purpose to prove generally, that a considerable portion of the lot was defective. Having kept the rope until then in their store, the plaintiffs had it yet in their power to obtain relief, either, by a new trial, or perhaps by an appeal; but by yielding, as they say they did, to the suggestions of the inferior Judge, and selling the rope, they have disabled themselves from returning the thing sold to the sellers, which is one of the indispensable requisites in every case of redhibition. It does not even satisfactorily appear that this sale was made by consent. It is true that they gave notice to the defendant, and his warrantors, of their intention to sell; but the defendants made no answer, except one of them, Mr. Samuel Bell, who objected to the terms of the sale, and protested against such a sale being considered a test of the value of the rope, for which he held himself in no manner bound to them. This rather threw upon the plaintiffs the responsibility of the correctness of the course they were pursuing. The sale took place on the 15th of December, 1841, at which time it appears that there had been a considerable decline in the value of the article, and it was made under a classification of four different qualities. At this sale the plaintiffs bought in themselves one hundred coils, which were considered as the best. They paid six and half cents per pound for the first fifty coils. This price appears to have been the market price of sound rope at that time, for two lots of good and merchantable rope, warranted as such, which were sold one on the same day, and the other a few days after, brought only six and half cents per pound. The second quality of this rope sold for six cents, the third at five cents and seven-eighths and the fourth at five cents per pound. The slight difference between these several prices renders it probable that there was not, between the different qualities of rope, such a great difference as that represented by Thompson and Jonau. Having no evidence before

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him of the value of the damaged or inferior coils of rope, the Judge below adopted the public sale as his guide in determining the reduction of price to be allowed the plaintiffs. He accordingly made no reduction on one-third of the rope, which was about the quantity purchased of Wallace & Co., and which is proved to have been sound. On the next third he allowed a reduction of fifteen per cent. on the original price, and on the balance twenty-five per cent. Under the peculiar circumstances of this case we cannot say that the Judge erred. If the plaintiffs have not obtained the full measure of indemnity to which they were perhaps originally entitled, they must blame for it no one but themselves. By persisting throughout in their own view of the extent of their right, they have so acted as to place it out of the power of the Judge to grant them either a rescission of the contract for any portion of the goods, or such a reduction of the price as, under the facts of their case, they might otherwise have obtained. 1 Mart. N. S. 317. Pothier, De la Vente, Nos. 217, 222. 6 Trop-long, Vente. 2 Ve. No. 567. No appeal has been taken by the defendant from the judgment rendered in favor of the warrantors.

Judgment affirmed.

THE NEW ORLEANS GAS LIGHT and BANKING COMPANY v.
JOHN B. ALLEN.

Where the purchaser at a Sheriff's sale, shows a judgment, execution, and sale, the presumption *omnia recte acta*, will arise in his favor. It is for the opponent, who seeks to annul the sale, to destroy this presumption, by proof of such irregularities as must vitiate the proceedings.

The purchasers of property subject to a mortgage with the *pact de non alienando*, are not entitled to notice of an order of seizure and sale. The property is liable to be sold as if still in possession of the original mortgagor.

The statement in the return of a Sheriff on an order of seizure and sale, is *prima facie* evidence of the advertisements and appraisements required by law.

APPEAL from the District Court of the First District, Buchanan, J.

G. Strawbridge, for the plaintiffs.

Josephs, *curator ad hoc*, for the defendant.

Schmidt, for the opponent.

BULLARD, J. Leech having purchased at Sheriff's sale a city lot, sold under an order of seizure issued upon a mortgage given by Allen to Hodge, and by the latter transferred to the Gas Light and Banking Company, (which act of mortgage contained the *pact de non alienando*,) Justamond, who had purchased the property of Allen subject to the *pact*, opposed the homologation of the Sheriff's sale at the hearing of the monition, on the following grounds :

1st. Because Allen, the original mortgagor, was neither legally cited nor represented.

2d. Because no notice of the seizure was given either to the opponent, or to Florance & Co., although the bank well knew that he and Florance & Co. had purchased the property.

3d. Because the seizure and sale were not made, and not advertised according to law.

4th. Because the property was not legally and properly appraised before the sale.

5th. That the whole proceedings were illegal, because they authorized and caused the whole property to be sold for cash, when it should have ordered the sale to be made for a sum sufficient in cash, to satisfy the claim of the Gas Bank, and the balance on such terms of credit as might suit the owner of the property.

6th. Because the rights and interests of the opponent have been sacrificed, without affording him an opportunity of being heard, or of defending himself.

These several grounds of opposition were overruled, the sale homologated, and the opponent has appealed.

The Sheriff's sale being admitted to have been made in pursuance of the order of seizure and sale contained in the record, the purchaser must be held to have acquired a good title, unless the opponent shows the absence of some essential forms. The burden of proof is upon him. The purchaser having exhibited a judgment, execution, and sale, the presumption arises in his favor, *omnia recte acta*. It is for the opponent seeking to annul

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the sale, to destroy this presumption by proof of such irregularities as would vitiate the proceedings. 8 La. 321.

I. The first objection appears to us not sustained. Allen, it is shown by the record, was represented as an absentee by counsel appointed for that purpose. It is not shown that he was present, and we must presume that the court acted upon proper grounds.

II. The second ground is untenable. The purchase by Justamond and Florance & Co., having been made subject to the *pact de non alienando*, they were not entitled to any notice. The property was liable to be sold as if still in possession of Allen, the original mortgagor.

III. The Sheriff's return on the order of seizure and sale shows that the seizure was made in May, and that, after due advertisements and appraisements, the property was sold on the fifth of September following. The parties appear to have been satisfied with this return of the Sheriff, which is *prima facie* evidence of legal notices having been given.

IV. The same remark applies to the want of an appraisement.

V. It is a sufficient answer to the fifth ground of opposition, that the whole property was liable to be seized and sold, inasmuch as the whole was mortgaged; and, even admitting the right of the defendant in the hypothecary proceeding to sell only so much as might be necessary to raise the sum due, or to sell for a balance on terms of credit, yet such right was not insisted on in the present case, and the opponent has no just reason to complain.

VI. The opponent cannot complain that he had no opportunity to defend his interests and rights. He had identified himself with the mortgagor by purchasing subject to the *pact*, and he suffered the property while in his possession, to be seized and sold, without any effort to protect his alleged rights.

Judgment affirmed.

Lafonta v. McAllister and others.

R. LAFONTA v. WILLIAM McALLISTER and others.

A certificate from the Judge of an inferior court, from which an appeal has been taken, will be received at any time to show error in the original certificate appended by him to the transcript of the record ; and, on a proper showing, the clerk of the lower court may also be allowed to amend his certificate.

APPEAL from the District Court of the First District, *Buchanan, J.*

T. Slidell, for the plaintiff.

L. C. Duncan, for the appellants.

BULLARD, J. The transcript in this case originally contained a certificate of the Clerk, and another of the Judge, that it contained all the evidence adduced on the trial below. It is now certified both by the Judge, and the Clerk, that this was erroneous ; that in fact a witness was examined, whose testimony was not reduced to writing. The only difficulty is in determining, whether these counter-certificates ought to be received. With respect to the Judge, we cannot doubt the propriety of taking his statement at any time, that his first certificate was given in error ; we have on some occasions permitted the Clerk to amend his certificate ; and that is the most regular way of proceeding. If this loose practice of giving false certificates is persisted in, we shall be compelled, *ex officio*, to exercise the powers vested in us, in relation to Clerks, who show themselves so regardless of the rights of parties, and whose blunders lead the Judges into error.

Appeal dismissed.

CALEB S. BENEDICT v. EDWARD STOW and another.

Action on certain bills protested for non-payment. Defence that plaintiff had agreed to renew the bills for three months from maturity, and proof of that fact and of tender by defendants of notes for the renewal. *Held*, that the obligation under the original bills was extinguished by novation, and that plaintiff could not recover, even with a stay of execution, till the expiration of the three months.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Benjamin*, for the plaintiff.

Kennicott, for the appellants.

MARTIN, J. The defendants being indebted to the plaintiff, the latter drew two bills of exchange on them for the balance of their account, which were accepted, but protested for non-payment. Judgment was taken by default, and set aside. The defendants then answered, admitting their acceptance of the bills, and averring that it was afterwards agreed between the parties, should the defendants find the payment of the bills at their maturity inconvenient, they should be novated by the defendants' notes, payable three months after the maturity of the bills, bearing interest at seven per cent per annum; that the defendants availed themselves of this agreement, and transmitted their notes accordingly, in due time, to the plaintiff, in compliance with plaintiff's own request. With a view to probe the conscience of the plaintiff, interrogatories were propounded. Judgment was given against the defendants, and they have appealed. The silence of the plaintiff, who forbore to answer the interrogatories, clearly admits the defence set up. His counsel has treated it as a dilatory exception, tending to show that the defendants were not suable until the maturity of their notes. The suit was evidently brought on the acceptances of the bills of exchange. The defendants urged, not a *dilatory* but a *peremptory* exception, to wit, that the obligation resulting from the acceptances was extinguished by a novation. We are unable to see on what ground our learned brother disregarded the defence set up. The only reason he gives for his judgment is, that the plaintiff had proved the allegations of his petition. He has suffered the defence to pass absolutely unnoticed. It is true, the petition concludes with a tender of the notes sent for the renewal of his claim on the bills; and the judge has thought that sufficient justice would be done to the defendants, by directing that no execution should be taken on his judgment, till the maturity of the renewing notes. In our opinion he erred. The plaintiff's claim was novated, and he was bound to wait the expiration of three months from the maturity of the bills of exchange, according to

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his agreement with the defendants, before he could urge his new claim on their notes.

It is therefore ordered and decreed, that the judgment be annulled, and reversed, and that there be judgment for the defendants, with costs in both courts.

CALEB S. BENEDICT v. WILLIAM H. WILLIAMS and another.

The exception that a suit is premature, is a dilatory one, which must be pleaded *in limine litis*. It is too late after a judgment by default.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Benjamin*, for the plaintiff.

Horner, for the appellants.

MARTIN, J. The defendants resisted the plaintiff's claim on an allegation that there was, and for two or three years had been, an understanding between the plaintiff and themselves, by which the obligations of the latter to the former maturing in New Orleans, were regularly renewed for three months, the usual bank interest being added, and without the payment of any curtailment, the renewals being met in full at maturity; that, according to this agreement, they offered to the plaintiff, at the maturity of the claim sued on, a renewal thereof, which was refused. A judgment had been taken by default, before the answer, setting up the above defence, was filed. The plaintiff's conscience was endeavored to be probed by interrogatories which he forbore to answer. There was judgment for him, and the defendants appealed. There is very little difference between this case, and that of the same plaintiff against Stow and another, just decided. In that the defendants had actually renewed their original obligations, on which the suit was brought. In this, the defendants urged that they were not bound to pay their original obligations, in consequence of the agreement which existed between the plaintiff and them, that they should be novated. It appears to us that

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the difference is material. The defendants were entitled to a delay of payment on paying bank interest for three months. Had the present suit been delayed until the expiration of that period, the delay would have been had with the payment of legal interest only. Their only complaint is, that the present suit places them prematurely in the situation in which the plaintiff might have fairly placed them thereafter. In other words, that the suit is premature. This circumstance afforded them a dilatory exception, which might have been successfully urged, *in limine litis*, but which cannot avail after a judgment by default.

Judgment affirmed.

FRANCISCO DE PAULO DE LIZARDI and others v. JEAN BAPTISTE POUVERIN and others.

Notice of protest served on an attorney in fact is sufficient, though the procuration does not confer specially the power to receive such notices, if it gives general powers to transact the business of the principal, he being abroad. To transmit such notice to the latter at a distant place, might endanger his recourse against previous endorsers, or the maker. *Aliter*, where the power is a limited one, conferring only certain special enumerated powers. In such a case, the procuration cannot be extended beyond what is expressed therein; and the power to receive a notice of protest is not necessarily included in that of endorsing.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Grima*, for the appellants.

Barthe, contra. The attorney in fact, Tricou, had no authority to receive notice of protest. *Montillet v. Duncan*, 11 Mart. 534. *Louisiana State Bank v. Ellery*, 4 Ib. N. S. 87.

MORPHY, J. The defendant, Jean Guimbillot, who resides in France, is sued as endorser of a protested note for \$1182 10, drawn to his order by J. B. Pouverin. The notice of protest was served on P. J. Tricou his attorney in fact, who had endorsed the note under a power of attorney expressly authorizing him to do so. There was a judgment below in favor of the defendant, and the plaintiffs have appealed.

The Judge below based his opinion on the case of *The Louisiana State Bank v. Ellery*, 4 Mart. N. S. 86, in which we held, that notice of a protest is improperly given to an attorney, with special powers which do not authorize him to receive such a notice. The present case, in our opinion, differs from that relied on. When the power is a special one, it cannot be extended beyond what is expressed in it, and the power to receive a notice of protest is not necessarily included in that of endorsing. In the present instance, the defendant's power of attorney to P. J. Tri-cou confers upon him, the most general and extensive powers to do and transact all his business in this State. After enumerating a variety of powers, among which are those of endorsing and making notes, *electing a domicile*, suing and being sued, &c., the power of attorney concludes with the following clause: "*et généralement faire tout ce que les cas pourront rendre nécessaire, sans qu'il soit besoin d'un mandat plus spécial.*" Under such a general power, we cannot believe that the defendant ever contemplated, that in case of the protest of any notes endorsed by him through his agent, the notice should be forwarded to him at his residence in Paris, instead of being served on the person authorized to act for, and represent him here, in all his affairs. In many cases, it might be extremely prejudicial to the interest of the principal to withhold from his agent notice of the protest of a note endorsed by the latter, and to transmit it to him at a distant place; the delay incidental to such a course might endanger his recourse against previous endorsers, or the maker. Notice to an attorney in fact, is in our opinion, sufficient, although the procuration does not specially confer upon him the power to receive notices of protest, if it gives general powers to transact the business of the principal, he living abroad. It is otherwise when the power of attorney is a limited one, conferring on the agent only certain special powers therein enumerated. 1 Robinson's Rep. 119. Moreover, the power to sue and be sued contained in the letter of attorney, might be considered as carrying with it that of receiving notice of any step or proceeding, which may become necessary to fix the legal responsibility of the principal before a suit is instituted against him.

It is therefore ordered, that the judgment of the Parish Court

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be avoided and reversed ; and it is further ordered, that the plaintiffs do recover of the defendant Jean Guimbillot eleven hundred and eighty-seven dollars and ten cents, with interest at the rate of five per cent per annum from the 23d of February, 1842, until paid, and the costs in both courts.

JOHN WALKER v. NORBERT VAUDRY.

Plaintiff having paid A. the amount of a judgment, for which he had become liable, as surety of B. on an appeal bond, obtained in February, 1842, a judgment subrogating him to all the rights of A. ; who, in December, 1840, had recovered judgment against defendant, as surety of B., on a bail bond executed at the beginning of the original suit, sued to revoke a sale made by defendant in December, 1840, as fraudulent ; *Held*, that the prescription of one year, established by art. 1939 of the Civil Code, must bar any action against defendant, by A. ; that plaintiff, being subrogated to A.'s rights, can have no greater rights than he had ; that the judgment of subrogation, of February, 1842, is not one rendered against the defendant, within the meaning of art. 1939 ; and that the prescription did not commence to run from its date, but from that of the judgment of A. against the defendant, obtained in December, 1840.

APPEAL from the District Court of the First District, *Buchanan, J.*

Barillette, for the appellant, cited *Thibodeaux v. Thomasson et al.*, 17 La. 353.

Barthe, for the defendant.

MORPHY, J. The plaintiff having paid to Archibald P. Howe, the amount of a judgment for which he had become liable, as surety on an appeal bond, for one John Frazer, obtained, on the 21st of February, 1842, a judgment subrogating him to all the rights of Howe ; who, on the 16th of December, 1840, had had a judgment entered up against the defendant Vaudry, as surety of the said Frazer, on a bail bond given at the inception of the suit. Having vainly endeavored, as he alleges, to obtain satisfaction of the judgment to which he was thus subrogated, the plaintiff, on the 31st of October, 1842, brought the present action, in which he seeks to avoid, and have revoked, a sale made by the defen-

dant Vaudry to F. Buisson on the 1st of December, 1840, as simulated, and executed in fraud of his rights. Several exceptions were taken by the defendant. The judge found it necessary to examine only one of them, to wit, that of prescription, which he sustained, and the plaintiff has appealed.

The inferior Judge decided correctly. The prescription relied on is founded upon art. 1989 of the Civil Code, which declares that the revocatory action is limited to one year, if brought by a creditor individually, to be counted from the time he has obtained judgment against the debtor. It is clear, under this provision of law, that Howe, who had obtained his judgment against Vaudry, on the 16th of December, 1840, could not have brought a revocatory action against him on the 31st of October, 1842. It is equally clear, that if Howe could not do it, Walker cannot; for a person subrogated to the rights of another cannot have any other, or greater rights than the latter had. But, it is contended, that the one year should be counted only from the 21st of February, 1842, when the plaintiff obtained a judgment against Vaudry. This judgment was not one rendered against the defendant, within the meaning of the article above quoted. It only gave to Walker the right of enforcing, for his own benefit, the judgment already rendered on the 16th of December, 1840, in favor of Howe; or, in other words, declared him subrogated to all Howe's rights under this judgment, in the same manner as if he had obtained from Howe a conventional subrogation to his said rights.

Judgment affirmed.

JOSEPH FIRMIN PERRAULT v. HIS CREDITORS.

No appeal will lie, under ordinary circumstances, in favor of the syndic of the creditors of an insolvent, from an order to produce his bank book.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

D. Seghers, for the appellant.

Redmond, for the opponent, cited *Bargebur v. His Creditors*,

Succession of Cucullu—M. S. Cucullu, Administrator, &c., Appellant.

2 Mart. N. S. 496, 521. *Prieur &c. v. Their Creditors*, 2 Robinson, 541. *Compton v. Patterson*, 1 Mart. N. S. 597. *Las Caygas v. Larconda's Syndic*, 4 Mart. 605. *Riker v. His Creditors*, 9 La. 161.

BULLARD, J. The syndic is appellant from a judgment sustaining his own exception to the opposition of the wife of the insolvent, but at the same time reiterating an order previously given, that he, the syndic, should produce his bank book.

This can be regarded as nothing more than an appeal from the order of the Judge to produce the bank book. Of this the syndic complains with a bad grace, and the judgment is not such an one as can be appealed from, under ordinary circumstances. *Bargebur et al. v. Their Creditors*, 2 Mart. N. S. 496, 521. *Prieur &c. v. Their Creditors*, 2 Robinson, 541.

Appeal dismissed.

SUCCESSION of SIMON CUCULLU—MANUEL SIMON CUCULLU,
Administrator &c., Appellant.

A testamentary executor, to whom the deceased bequeathed a certain sum as a recompense for services rendered by him, and as an evidence of the friendship of the testator, and who has accepted the bequest, cannot claim any commission for his services, unless the testator formally expressed his intention that such legacy should be over and above the commissions. C. C. 1679. Nor where, after the expiration of his term as executor, he has continued to act as administrator in the settlement of the estate, can he charge any commission in the latter capacity. His legacy stands in lieu of all commissions, in the administration of the estate.

One who has accepted a remunerative legacy, will be bound by the acceptance. If he considered himself entitled to claim a larger sum for his services, he should have renounced the legacy, and have claimed as a creditor.

MANUEL SIMON CUCULLU is appellant from a judgment of the Court of Probates of New Orleans, *Bermudez*, J.

D. Seghers, for the appellant, cited 4 Merlin, Repertoire, 40, Id. p. 154, *verbo* Donation, sect. 8, § 3. 5 Toullier, p. 328, No. 304. 1 Grenier, p. 370, No. 188. 8 Pandectes Françaises, p. 457, No. 252. 6 Pothier, Traité des Donations, p. 491, sect. 3, § 1. 1 Ib.

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Traité de Vente, p. 689, 7 part, Des actes et contrats qui ressemblent au contrat de vente, art. 1. De la dation en paiement, Ib. p. 691, art. 2. Donation Rémunératoire, Nos. 607 a 611. 3 Furgolle, Testamens, p. 536, No. 112. 2 Id. Donations, p. 113, question 15. 7 Digest, p. 667, tit. 17, lib. 50. De Regulis Juris, l. 73, § 3. Civil Code of Louisiana, arts. 1500, 1676, 1679, 1510, 1511, 1512.

Canon, contra.

BULLARD, J. The principal question in this case is, whether the son of the testator, who was appointed his testamentary executor, and afterwards acted as administrator of his father's estate, be entitled to commissions, he having received a legacy of \$10,000, by the will, over and above his legitimate portion as heir.

The legacy is given in the following terms : *Je donne et lègue par hors part d'héritage a mon fils aîné Manuel Simon Cucullu dix mille piastres en récompense des services qu'il m'a rendus et de l'amitié particulière que je lui porte.*"

The code is explicit, that "testamentary executors, to whom the testator has bequeathed any legacies or other gifts, by his will, shall not be entitled to any commission, unless the testator has formally expressed the intention that they should have the legacies over and above their commission." Art. 1679.

It is, however, contended by the counsel for the appellant, that this principle does not apply to remuneratory donations ; that donations of that class are not properly donations, but *dations en paiement* ; and to this effect, various authors are cited. It is, however, apparent, that the legacy to Manuel Simon Cucullu was not wholly remuneratory, the testator having declared that he intended not merely to recompense services rendered, but to testify the particular esteem which he had for his son. If any part of it was a pure gratuity, he is not entitled to his commissions. The appellant thereupon offered evidence to show the value of the services which he had rendered ; which, he contends, even exceeded the amount of the remuneratory donation. The evidence was rejected, and a bill of exceptions was taken. The court did not err. If the son thought that he had a larger claim for services rendered, he might have renounced his legacy, and have claimed

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as a creditor of the estate. Having decided to accept the legacy, he must take it as it is, partly remuneratory, and partly as a gratuity. It would be quite ungracious in him to deny, that any part of the donation sprung from paternal affection. The son ought to regard those expressions as the most precious part of his father's will.

We are of opinion, that the same heir and legatee is not entitled to charge commissions as administrator, after his term as executor has expired. All he did, in either capacity, was to administer upon the estate; and, under the existing law, his functions as executor would have been continued until the whole estate was settled. His legacy is considered, in law, as standing in lieu of all commissions for the administration, settlement, and liquidation of the estate of the testator.

Judgment affirmed.

JONATHAN ALSTON v. HENRIETTA C. ROSS.

One who has undertaken to build a house by the job, according to a plan agreed on, cannot claim an increase of pay for extra work, unless he proves that it was done at the request of the other party. C. C. 2734.

APPEAL, from the Parish Court of New Orleans, *Maurian, J.*

MARTIN, J. This suit is brought for the balance of the price of houses built for the defendant, according to a contract, and for extra work. The defendant pleaded the general issue, but admitted, that she was indebted to the plaintiff in the sum of \$963, and claimed damages, in reconvention, for the plaintiff's delay in delivering the houses; for his failing to put eleven sets of window shutters to the houses; and for neglecting to make a fence of one hundred feet in length, and to paint the houses in a workmanlike manner. In a supplemental answer, the defendant claimed in compensation a sum which she had been compelled to pay for the plaintiff, since her original answer. The court sustained the plaintiff's claim for \$1031 04½, disallowed the defendant's claim

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in reconvention, except for \$75 on account of the painting, and allowed the plea in compensation, leaving a balance of \$1031 04½ for which the plaintiff had judgment, and the defendant appealed. Her counsel admits, that the claim in the petition would not have been objected to, if the plaintiff had complied with his contract, and the extra work had been done at her request. We do not think that the Judge erred in concluding, that the testimony did not support the defendant's allegations that the houses were not built according to the contract, except as far as it relates to the painting, which he has allowed, on her plea in reconvention. But we think that he erred in allowing the claim for extra work, as it does not appear that any part of it was done at the defendant's request. Art. 2734 of the Civil Code. The defendant's claims in reconvention, except that which relates to the painting, were not sufficiently supported by the testimony. The court, in the plea of compensation, overlooked the payment of \$21 paid by the defendant for fees, in addition to the \$358 95 allowed. The defendant is, therefore, entitled to the sum of \$165 for the extra work incorrectly allowed, and the \$21 just mentioned, in all \$186, which reduces the judgment appealed from, to \$845 04½.

It is therefore ordered and decreed, that the judgment be annulled and reversed, and that the plaintiff recover, from the defendant, the sum of \$845 04½ with legal interest from judicial demand until paid, and with costs in the Parish Court, and that he pay those of this appeal.

Elmore and W. W. King, for the plaintiff.

G. Ross and Preston, for the appellant.

JONATHAN MONTGOMERY, Executor of William Nott, deceased,
and others v. JAMES S. BRANDER and others.

Defendants, commission merchants, having contracted to sell a quantity of cotton belonging to their principals, to a third person for cash, before payment of the price or delivery, plaintiffs seized, in the hands of such third party, under a *f. fa.* in a judgment against defendants, all the property, rights and credits of the latter. *Held*, that the vendors not being bound to deliver the cotton until the price was

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paid (C. C. 2463,) nothing was seized; and that the vendee might have disregarded it, and have paid the price to defendants and received the cotton.

The property of the principal cannot be seized under execution by a creditor, even to the extent of the consignee's privilege; the creditor of the consignee in such a case, must attach or seize the claim of his debtor in the hands of the consignor.

APPEAL from the Commercial Court of New Orleans, *Watts, J. G. Strawbridge*, for the appellants.

T. Slidell, Benjamin, and Grymes, for the defendants and intervenors.

MARTIN, J. The plaintiffs, judgment creditors of the defendants, seized in execution in the hands of Bergerot, all the property, rights and credits of their debtors, who had sold him six hundred and twenty bales of cotton, which they had received for sale, as commission merchants from several planters in the neighboring States. On his communicating the seizure to the defendants, and informing them that it would not be in his power, in consequence thereof, to comply with the terms of his purchase, to wit, a cash payment, they deemed it their duty to protect the interest of the planters, by preventing the cotton from being applied to the payment of their own, the defendants', debts, and made a sale of the six hundred and twenty bales, to Price, who thereon delivered to them, in part payment, a check for twenty thousand dollars, which was duly paid. The petition, alleging the nullity of the sale to Price, as fraudulent and collusive, prays for the sequestration of the cotton, and that the defendants, and Price, and Bergerot may be cited, in order that, contradictorily with them, the rescission of the sale to Price may be decreed and the plaintiffs be paid out of the proceeds of the cotton, or that the sale to Bergerot may be confirmed, and the proceeds applied to their claim. The sequestration was issued. Bergerot intervened, admitted his purchase of the cotton, and the seizure in his hands by the plaintiffs, stating that a number of bales were marked by his directions, and put in his name on the books of the press where it is lodged. He alleged the simulation of the sale to Price, and prayed that the cotton might be delivered to him, on his depositing the price in court. Price intervened, as well as the consignors of the cotton to the defendants. The court ordered the cotton to be delivered to Price, on

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his giving bond with security, which was done. It directed the dissolution of the sequestration obtained by the plaintiffs; that as between the plaintiffs, and Price, and Bergerot, there be judgment against the former; that as between the plaintiffs and the consignors of the cotton, there be judgment for the latter, who are decreed to be entitled to the proceeds of the cotton, in proportion of their respective interests therein; that as between Bergerot and the defendants, there be judgment for the latter; and the costs to be paid by the plaintiffs, who have appealed.

It does not appear to us that the First Judge erred, in concluding that the plaintiffs had not seized anything in the hands of Bergerot. His vendors were not bound to deliver the cotton until they had received the price; (Civil Code, art. 2463;) and he might have disregarded the seizure in his hands, and have paid the price, and received the cotton; and this would have rendered the seizure abortive. Judgment was properly given in favor of Price, to whom the defendants might well have sold their cotton to raise money for their consignors, or pay their own debt. It appears that Price actually paid the amount of his purchase, within a very small fraction, indeed, if not entirely. The counsel for the plaintiffs and appellants has, however, complained, that the court erred in not giving judgment in their favor for the claim of the defendants on the consignors of the cotton. The property of the principal cannot be seized by a creditor of the consignee, even to the extent of the consignee's privilege. The creditor of the consignee, in such a case, is driven to an attachment or seizure in the hands of the consignor, of his debtor's claim.

Judgment affirmed.

G. Strawbridge, for a re-hearing. The facts, which have never been contested, are these:

The plaintiffs, with a judgment for upwards of \$10,000, had their execution levied in the hands of Bergerot, who had purchased 620 bales of cotton from defendants. This being communicated to defendants, efforts were made on their part to induce Bergerot to cancel the sale, with a view to defeat the seizure, and it is distinctly proved that Wright, one of the firm, proposed to him that a sale should be made to some third person by the defendants, from whom Bergerot might again purchase at a small advance, which should be made good to him. This proposal he refused, by

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the advice of his counsel, when Wright declared he would sell the cotton, and pay Bergerot damages, according to the advance of price.

The seizure was made on Saturday, about three o'clock: this negotiation took place on Sunday; and on Monday morning, about 6 o'clock, a transfer was made on the books of the Lower Cotton Press, to Thomas K. Price; and a previous transfer of a part, or of the whole, to Bergerot, was erased. It is also in proof, that under the sale to Bergerot, they were, on Saturday, employed in turning out of the press and marking the bales; 160 of which had Bergerot's mark put on them, and they were prevented from completing it and weighing them by a shower of rain. Some knowledge of these movements having come to plaintiffs' knowledge, a writ of sequestration was taken out, and the cotton taken, when it was bonded by Price in opposition to Bergerot's application to take it and deposit the price in court.

On the trial, Price produced a check and receipt for the round sum of \$20,000; he produced no bill of parcels—showed no weights—no broker had intervened—no fractional sum had been paid, to meet the difference. It stands in proof, a sale of 620 bales of cotton for \$20,000, naked of any other circumstance in its favor; and lastly, it may be added, that in the argument in this court, it was avowed that Price's object in the sale was, to defeat the plaintiffs' seizure.

What I first complain of, is, that in the statement of facts made by the court, not one word has been said of, nor from any thing therein appearing, could it be gathered, that any fraud or simulation was in question, or any circumstance shown to support such a charge; but that Thomas K. Price was a bona fide purchaser.

I complain also, that in the same statement no notice is taken of another fact, viz., that by an account furnished from the books of Brander, McKenna & Wright, it was shown and agreed as a fact, that the intervening owners of the cotton were indebted to them in the sum of \$5,611 16 for expenses and advances—omissions the more remarkable, as they were the main reliance of the plaintiffs, and the Judge below had expressed his conviction that the sale was simulated. With these matters made straight, let us proceed to an examination of the legal principles laid down by the court, which are three, viz.—

First—The vendors (Brander & Co.) were not bound to "deliver the cotton until the price was paid." C. C. 2463. The rule is inexact and inapplicable to the case, from the omission of the fact that a third person had seized the price. Art. 2539, of the Civil Code, provides, that if the buyer does not pay the price, the seller may sue for the dissolution of the sale, so that wherever an attachment or seizure is made on the price of a sale, the vendor may, if the goods are not delivered, refuse such delivery, or if delivered sue for the dissolution of the sale, and thus defeat his creditor. I cannot forbear the expression of my surprise at such a fallacy. The law of 1839, page 166, providing for taking debts in execution, has this clause:—"A copy of this order, with a receipt of the Sheriff, shall be delivered to said third person (Bergerot) and shall be deemed equivalent to a receipt from the debtor (Brander & Co.) himself." Should it be said this is only applicable to the proceedings under this particular law, I answer, not so; the whole system of taking debts under seizure or attachment, is from its very nature a payment to, or for, or in discharge of the defendant, or in legal effect a payment to him. Suppose A., under a judgment against B., issues execution against C., a debtor of B. A.'s judgment is for

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\$1000; he collects B.'s debt due by C. for \$500; can he, A., issue a second execution for the full \$1000, or is it paid and satisfied to the amount of one half?

But even this is unnecessary—the articles quoted do not say the price must be paid *to the vendor*—it must be paid, and it may be paid to a seizing creditor, as has been shown, as legally and effectually, as to the vendor. It is untrue therefore to say the seizure prevented Bergerot from paying the price, or authorized Brander & Co. to withhold the thing sold, much less treat it as a nullity and sell it to another. Whatever Bergerot paid would have been a compulsory payment under legal process—it would have been a payment for Brander & Co., and the latter must have credited him for so much of the price of the cotton. All doubt on this head would have been put at rest, by an application to the court to have it delivered to him on payment into court of the price. Moreover, art. 2428, C. C., declares, that the sale of property in litigation has no effect. So held this court in Long and French, 13 La. 257; in Harvey and Grymes, 8 M. R. 395, and 6 La. 58. They held that property attached could not be mortgaged. One would suppose property in execution fell under the same rule. In fact it has been so adjudged in Duffy and Townsend, 9 M. R. 585. At present the doctrine is not that the sale is null, but that “*it renders the seizure abortive.*”

Second Proposition. “The vendee might have disregarded the seizure in his hands, paid the price and received the cotton, and thus would have rendered the seizure abortive.”

Payment made by a debtor to his creditor, to the prejudice of a seizure or attachment, is not valid with regard to the creditor seizing, &c.; those may, according to their claims, oblige him to pay anew, and he has in that case recourse to the creditor alone. C. C. art. 2145.

I have placed this proposition in juxtaposition with an article of the Code, and I feel it would be difficult to make an argument to show their utter inconsistency.

Third. I pass to the third proposition. “The property of the principal cannot be seized by a creditor of the consignee, even to the extent of the consignee's privilege. The creditor of the consignee, in such case, is driven to the attachment or seizure in the hands of the consignor of his debtor's claims.” Most assuredly the consignor's property cannot be attached to pay the consignee's debt. A man's property is the common pledge of his own creditors, but not of his neighbor's—but his own property of whatever kind is so subject. The execution required the Sheriff to seize the property of Brander & Co. The only question therefore was and is, had he property to the extent of \$5,611 16 in Bergerot's hands. The fact agreed upon, and not open to contradiction, shows he had. In the argument at bar, I stated, that not less than an hundred cases had been so ruled by the Judge of the Commercial Court, and that the C. C., art. 3214, gave to every factor a privilege on the property in his hands to the amount of his expenses and advances. In these cases, which generally arose in suits by attachment of property for debts of the consignor, the factor intervened and claimed to be paid out of the proceeds of the goods with privilege, and wherever he made out such a case, it had been allowed; and repeated appeals to this court has affirmed the rule. I will only refer to the case of Powell and Gwynn, 18 La. 321, it being the last reported, and an appeal from the Commercial Court to this, of which I shall say more hereafter. From these cases it results, that the factor who has sold goods, has a vested interest in the price,

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recognized in law as distinct and separate from the portion due to the consignor; that it is a debt due to him, for there can be no privilege where there is no debt—in short, that it is his property. He may assign or transfer it as other debts. If he fail, it passes to his syndic; if he die, to his executors, who put it on his inventory; and even according to this very inexact proposition, it may be attached or seized as his property, provided the consignor be the garnishee, and not the person in whose hands it is. Upon what law or principle is it, that the same thing which will be adjudged to the factor in a suit where he intervenes, and given up as his property, is treated as a shadow, as nothing, when he is made defendant? Surely not because he has no property in it—his right does not arise from the suit, which is only a mode of enforcing it. It depends on the law, and he must have it alike, whether plaintiff, or defendant, or intervenor.

But it must be seized or attached in the consignor's hands. The said intervenors live all over the cotton country, from Tennessee to Texas; some own three, some five, some fifteen or twenty bales. Under such a rule, the creditor must bring fifty suits, in some half a dozen different States, for this sum of \$5,600. Leaving this out of view, on principle alone, I should think the seizure should be made where the fund was found, as in other cases of seizure or garnishment. Let us look, however, both to precedent and the Code: they are clear enough.

Returning to the case of Powell and Gwynn. At page 327 we find this striking language: "The solution of these questions will depend mainly on the application of the general rule so often sanctioned and recognized in our jurisprudence, that when the owner of property has lost all power over it and cannot change its destination, his creditors cannot attach it, and so if the defendants themselves, (the consignors) could not have taken the property out of the hands of the garnishee (the consignees,) it is clear the plaintiff cannot." Further on it is decided, that the owner could not take it out of the factor's hands where it had been sent to pay advances, and that the plaintiff (his creditor) could not. How tallies this with the rule laid down in this case? How can I attach Brander & Co.'s debt in the consignor's hands, under the rule that the latter could not withdraw it from them or under this contract in Bergerot's hands, unless by satisfying the debt? Is it not plain that if I had made the owners garnishees, and proposed to them the interrogatory, Are you indebted to Brander & Co.? they must have answered No, that they are indebted to us. Is it not equally plain of Bergerot's debt, that the price could not have reached them till Brander & Co.'s privilege was satisfied, and that in no case could I seize in their hands. Add to this, that art. 2992, of the Civil Code, gives the mandatory the right to retain out of his of principal's property the sum due him. How are we to settle these contradictions? Simply by reading the *whole* of the article under which these rights of the factor are established—the last clause of which provides, that "This privilege extends to the *unpaid price* of the goods which the agent or consignee shall have received and sold." Brander & Co. then had a privilege on the *unpaid price* of the cotton sold. Where was he to seek for the unpaid price? In the hands of the consignors, say the court. To my limited view, when the unpaid price reaches the owner's hands, 't is no longer unpaid. I should look for the unpaid price in the hands of the purchaser, exactly where I did look for it in Bergerot's.

Before quoting this article, let me urge its application to the first proposition—"the privilege is on the unpaid price." No distinction is made between a cash sale

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and a sale on credit: *Ubi lex non distinguit nec non debemus nos distinguere*; and where a seizure has been made of a price secured by a 60 days' note, 't is just as good a cause of annulling the contract as in a sale for cash, and equally renders the seizure abortive. Toul. vol. 7, speaking of the case where one creditor had received something to the prejudice of a seizing creditor, concludes thus: *Le créancier lui répondrait avec avantage que si la vente est parfaite, et la propriété acquise de droit à l'acheteur par le seul consentement, quoique la chose n'ait pas été livrée, ni même le prix payé, ce principe n'est vrai, dans toute son étendue, qu'entre les parties et à l'égard du vendeur.*" No. 34, page 54.

And here I might conclude the argument, did not the ground by me deemed the strongest remain untouched. Let me here ask, (leaving out of question the plaintiff's seizure,) could Bergerot, under the proof on record, have compelled Brander & Co., to a specific performance, and *vice versa*. No one, I think, will deny it. How then does the sale to Price vary it? It brings up the identical case put in art. 1916, of the Civil Code, of a second sale, the delivery under the first not being made. Who is under that article the second purchaser, whom the law protects—"a bona fide purchaser, without notice of the first sale." The court cannot therefore pass this matter by. Poth. on Ob., No. 153, is more explicit—his language is, "Observe, however, that if the debtor was not solvent at the time of transferring the thing to another which he was obliged to give me, I may proceed against the person who so acquired it to procure a rescission of the sale made to him in fraud of my claim, provided he was privy to the fraud, in case his acquisition was an onerous title; if it was a gratuitous title, his purity would be unnecessary." Now I ask an examination of the facts in the light of plain common sense. The whole matter occurred between Saturday, after the bank hours, and Monday at 6 A. M. The sale undoubtedly was made on Sunday afternoon, or on Monday before sunrise, and the transfer to Bergerot erased; \$20,000 are given for 620 bales of cotton, 160 of them with Bergerot's mark on them; their assorted delivery no more shown than Bergerot's, for there is no proof they ever were weighed. On Monday morning, after the transfer to Price, Wright and Bergerot met, and to Bergerot's reproaches Wright replied he could do no more than he proposed in his letter;—that letter proposed, "that Bergerot should have the cotton by paying the same price he originally gave—that Wright had solicited the person to whom he had made the second sale to let Bergerot have it, and that he had consented on receiving one-eighth of a cent for his trouble and risk, and it was now ready for delivery." This accommodating friend was Thomas K. Price, who buys cotton on Monday before sunrise, by hundreds of bales without weighing, and pays \$20,000, without knowing what his bill amounts to—the person designated by Mr. Wright on Sunday, "to whom he would sell any how."

Suppose however, both he and Mr. Wright spotless. Have not Brander & Co. a privilege both on the cotton, and its proceeds, under the sale to Price? Has not Mr. Price bonded it, and if he has paid the whole price, paid it in prejudice to the seizure of Nott. Why is he not liable on this score? And why may I not sue him? I refer to art. 1964 and the authority of Pothier, as above, to meet this objection.

Re-hearing refused.

RAMON FARIAS v. M. DE LIZARDI and others.

Receipts signed by a third person in his own name, and not shown to be connected in any way with the defendants, are inadmissible in evidence against them.

APPEAL from the District Court of the First District, *Buchanan, J.* This was an action to recover back an amount alleged to have been paid to defendants, beyond what was justly due. The defendants answered by a general denial, and claimed in re-convention, a balance alleged by them to be still due. The case was tried by a jury.

Greiner, for the appellant.

Hoa, for the defendants.

MARTIN, J. The plaintiff is appellant, from a judgment against his claim, and on that in reconvention of the defendant, after an unsuccessful attempt to obtain a new trial, which was asked on the grounds of the verdict being contrary to law and evidence, and of the court having erred in sustaining the objection of the defendants to the introduction of three receipts offered in evidence. The receipts were rejected on the ground, that nothing connected them with the defendants. They were signed by a man of the name of Palacio, apparently in his own right, and nothing showed that in doing so, he acted as the agent of the defendants. Evidence was however given, that he acted often as the agent of the defendants, and the plaintiffs produced several receipts of his, which he had subscribed as agent of the defendants. The plaintiff is a vendor of segars, and usually purchased them from the defendants. Palacio was a dealer in the same article on his own account, and the plaintiff occasionally purchased from him. On a settlement between the parties to the present suit, the defendants refused to allow credit for the sums for which Palacio had receipted in his own name; but promising to make inquiry about them, and allow credit therefor, if it turned out that they had been received on their account. The inquiry proving unsatisfactory, they refused to allow the credit, and the present suit was brought.

It does not appear to us that the court erred. The plaintiff

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took another bill of exceptions, to the refusal of the judge to allow him to ask a question of a witness; but the counsel has informed us, that it would be useless to remand the case, as this would not enable him to avail himself of the question, as the witness has since died. This renders the examination of the correctness of the Judge's opinion useless.

On the merits, the case is certainly with the defendants.

Judgment affirmed.

THOMAS BARRETT v. HIS CREDITORS.

To annul a mortgage on the ground that it was executed *in tiempo inhabil*, and intended to secure to the mortgagee an illegal preference over the other creditors, it is not enough that the fact of insolvency be shown; knowledge of it must be brought home to the mortgagee. C. C. 1973, 1979, 1980. And the action to annul must be brought within one year from the date of the mortgage. Ib. 1982.

APPEAL from the Parish Court of New Orleans, *Maurian, J. L. Janin*, for the syndics.

F. B. Conrad, for the appellants.

MORPHY, J. The Planters and Merchants Bank of Mobile, are appellants from a judgment overruling their opposition to a provisional tableau of distribution, filed in this case. They had opposed a claim of the New Orleans Gas Light and Banking Company as mortgage creditors, on the ground that their mortgage was executed at a time when Thomas Barrett, their debtor, was notoriously, and to their knowledge, insolvent; and that the mortgage was given to secure to them an unjust and illegal preference over the other creditors, and was therefore null and void. The mortgage sought to be avoided, was executed on the 12th of October, 1837. This case turns on a mere question of fact, to wit, whether at the time the mortgage was taken, the mortgagees knew that Thomas Barrett, their debtor, was unable to pay all his debts. The evidence adduced on this head has satisfied us, as it did the court below, that although Thomas Barrett had been under protest for some months previous to the time this mortgage was given

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to the appellees, he believed himself, and was generally considered as perfectly solvent, up to the year 1839 ; that his property, at a fair valuation at the date of the mortgage, appeared greatly to exceed the amount of his debts, although since, by the unprecedented depreciation of property of every kind, he has actually become insolvent. Nothing shows that the appellees then knew, or believed, that their debtor was unable to pay all his debts, and sought to procure to themselves an unwarrantable advantage over the rest of his creditors. It is not enough that the fact of insolvency be shown ; knowledge of it must be brought home to the creditor who has obtained the mortgage, or preference attempted to be avoided. Civil Code, arts. 1973, 1979, 1980. 4 La. 250.

But there is another ground upon which the appellees might have safely rested their case under proper pleadings. It is furnished by article 1982 of the Civil Code, which declares, that "no contract made between the debtor and one of his creditors for the purpose of securing a just debt, shall be set aside, &c. although the debtor were insolvent to the knowledge of the creditor with whom he contracted, and although the other creditors are injured thereby, if such contract were made more than one year before bringing the suit to avoid it, and if it contain no other cause of nullity than the preference given to one creditor over another."

No attempt to set aside this mortgage, on the grounds assumed in the appellant's opposition, was ever made before the 10th of April, 1841, when the opposition was filed. 3 La. 28.

 SUCCESSION of PHILIPPE DUCLOSLANGE—EDOUARD DUCLOSLANGE, Appellant.

The deceased bequeathed to the mother of his natural children certain lots of ground, "*pour en jouir sa vie durant, reversible après elle à mes enfans naturels alors existans, ou à leurs représentans.*" Held, that this was no substitution, but a bequest of the usufruct to the mother, and of the property to the children, allowed by art. 1509 of the Civil Code ; and that the rights of the latter vested at the opening of the succession of the testator, and not at the death of the mother.

Unless the will necessarily presents a substitution, and can be understood in no other manner, the disposition will be sustained.

Succession of Ducloslange—E. Ducloslange, Appellant.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Bodin, for the appellant.

L. Pierce, contra.

MORPHY, J. In this suit, which was one for a partition among the natural children of the late Philippe Ducloslange, of some real property bequeathed to them by their father, Levi Peirce who held a judicial mortgage recorded in November, 1837, against Edouard Ducloslange, one of them, for \$1818,50, and F. Buisson, as syndic of the creditors of said Edouard Ducloslange, who had failed in 1838, were ruled to show cause why the mortgage should not be cancelled and erased, so far as it bore upon the property sold to effect the partition, reserving all their rights to the amount coming to the insolvent from the sale. Levi Pierce and the syndic answered to the rule, both claiming a right to the portion accruing to Edouard Ducloslange. The insolvent, Edouard Ducloslange, then filed a peremptory exception praying for the erasure of the mortgage, and the dismissal of the claims of Peirce and Buisson, on the ground, that he had made a cession of his property since the date of the claim set up by Peirce; that the principal debtor of said claim had likewise failed; and that no suit can be brought before those two estates are settled. There was a judgment below decreeing the erasure of the mortgage, and ordering that the sum accruing to E. Ducloslange should be received by F. Buisson, to be applied under the direction of the District Court of the First District, where the insolvent proceedings were pending. Edouard Ducloslange has appealed.

The only question in this case is at what time the appellant's right to the property in dispute accrued. He contends that it was at the death of his mother, Eulalie Bacchus, in 1841, after he had made a cession of his property; while, on the other hand, it is urged that his right originated at the time of the opening of the succession of Philippe Ducloslange, his natural father, long before his surrender. If the appellant's position be correct, he contends that under article 2173 of the Civil Code, his property acquired, since his *cessio bonorum*, cannot be seized by anterior individual creditors.

 Succession of Ducloslange—E. Ducloslange, Appellant.

The solution of this question must depend upon a proper interpretation of the clause of the last will of Philippe Ducloslange bequeathing the property to his natural children. It reads thus ; "*En reconnaissance et pour salaire des soins et bons services qui m'ont été précédemment rendus par la négresse libre sus-mentionnée, Eulalie Bacchus, je lui lègue, pour en jouir sa vie durant les trois terrains de l'îlet 78, avec les bâtisses et établissemens qui s'y trouvent, le tout réversible après elle à mes enfans naturels alors existans, ou à leurs représentans si aucuns il y a. En outre je lui donne et lègue en toute propriété les bêtes à cornes qui pourront se trouver, lors de mon décès ; &c.*"

The counsel for the appellant contends that, under this clause, which, he says, contains a substitution, his right to the property vested only at the death of the trustee, Eulalie Bacchus, in 1841 ; that before that time he had only an eventual right, or rather a hope which could not be transmitted to his heirs, or surrendered to his creditors. Such were undoubtedly the effects of a substitution, under those laws which sanctioned that manner of disposing of property ; but if the will of the appellant's father contains a substitution as he pretends, then no right whatever to the property he claims, ever vested in him. Civil Code, art. 1507. The Judge below was of opinion, that the testator intended to make of this property the disposition permitted by article 1509 of the Civil Code, to wit, that he bequeathed the usufruct of it to Eulalie Bacchus, and the property to his natural children, and that therefore the right of Edouard Ducloslange vested at the opening of the succession of his father, long before his surrender. This construction is warranted by the words of the testator, which convey the idea that he intended to give to Eulalie Bacchus only the enjoyment of his real property ; and it is much strengthened by the language he uses when, in the same clause of his will, he bequeaths to her his cattle and moveables. It is true, that the testator does not expressly mention that he actually bequeaths to his natural children the real property of which he gives the enjoyment to their mother during her lifetime ; but that such was his intention, appears to us to be fairly deducible from the declaration that the whole property shall go to them, or their representatives after her death. It is sometimes difficult to ascertain the true charac

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ter of dispositions of this sort ; but in cases of doubt it should always be presumed that the testator intended to do that which was lawful, rather than that which was prohibited by law. It is on this principle that this court, and the tribunals in France, have held, that unless a clause in a will necessarily presents a substitution, and can be understood in no other manner, it will be sustained. 7 Mart. N. S. 417. 4 La. 504. 5 Toullier, Nos. 44 and 46. Merlin's Rep. *verbo* Substitution, Fiduc., Sect. 8., No. 7. The intention of the testator was after all a question of fact. We cannot say that the Jndge erred in the view he took of it : *voluntatis quæstio in estimatione judicis est*. In conclusion we must remark, that the appellant appears before us with extreme bad grace, in an attempt to show that the will under which he derives the property which he seeks to withhold from his creditors, contains a substitution by virtue of which he could lawfully take nothing. Civil Code, art. 1507.

Judgment affirmed.

VICTOIRE PICOU v. BARTHELEMY FERGUS DUSSUAU, and others,
Heirs.

Art. 996 of the Code of Practice which provides, that when an estate "is in the possession of heirs, either present, or represented in the State, though all or some of them be minors, actions for debts due from such successions shall be brought before the ordinary tribunals, either against the heirs themselves, if they be of age, or against their curators if they be under age or interdicted," applies to estates accepted absolutely, or to those which, after having been administered by a curator, testamentary executor, &c., have come into the possession of the heirs. If the heirs be all of age, and accept unconditionally, they are immediately put in possession of all the property, and are suable before the ordinary tribunals for their virile portion of the debts, as if contracted by themselves. If some are minors, the succession cannot be accepted by, nor for them, but with the benefit of inventory. When thus accepted, it cannot be administered partially, but the whole estate must be placed under the management of an administrator, and no part comes legally into the possession of the heirs as such, until the administration is terminated, or a partition is legally made among the heirs. Until such administration or partition, the estate must be administered under the authority of the Court of Probates, in which it was opened, and all claims for money against it must, under arts. 924, §

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13, and 933 of the Code of Practice, be presented there for settlement. C. C. 1002, 1040, 1051. C. P. 992. Act 25th March, 1828, ch. 83, § 13.

A claim for a sum of money against a succession, should not be engrafted on a proceeding, the object of which is to call upon the heirs to declare whether they accept or refuse the estate. Where, under such a proceeding, the heirs of full age fail to answer whether they accept or renounce, they may be declared unconditional heirs, and liable to be sued as such. C. C. 1029. But as to minors, no judgment of any kind can be rendered against them. They can, under no circumstances, be considered as having accepted absolutely; (C. C. 346;) but must be regarded as heirs of age, accepting with the benefit of inventory. The succession should have been put under administration, as provided by art. 1040 of the Civil Code.

APPEAL from the Court of Probates of St. John the Baptist,
Le Blanc, J.

MORPHY, J. The defendants, three of whom are of age, and the other a minor, are sued as the heirs of the late Marie Louise Dussuau, on a promissory note for \$3000, drawn by the deceased to the order of the plaintiff. The latter represents, that Marie Louise Dussuau, who died intestate, in the parish of St. John the Baptist, left real property and slaves, of which the defendants, her children, took possession, without previously taking the necessary steps for the affixing of seals, or making an inventory of the property of the succession; and that, although amicably requested, they refuse to pay the said note. She prays that a tutor *ad hoc*, may be appointed to the minor; that the defendants may be cited to declare whether they accept or refuse their mother's succession; that if they accept, judgment be rendered against each of the four heirs, thus accepting for one-fourth of the sum of \$3000, with five per cent interest per annum, from the 8th of May, 1841, with costs; that the same judgment be rendered against them in case they neglect to answer the petition within the legal delays; on the other hand, should they, or any of them, declare their acceptance of the succession under benefit of inventory, that an inventory of the property of the succession may, in that case, be made, an administrator appointed, and he cited and condemned to pay her out of the funds of the estate, and in the due course of his administration, the sum of \$3000; &c. The defendants excepted to the jurisdiction of the Court of Probates, pleaded the general issue, and averred that their mother had paid and extinguished the note sued on by partial payments, a statement of

which they annexed to their answer. There was a judgment below, decreeing the defendants to pay the amount of the note, with legal interest from the 8th of May, 1841; and they have appealed.

The counsel for the appellants has rested his plea to the jurisdiction of the Court of Probates, on art. 996 of the Code of Practice. He contends, that as the petitioner has alleged that the defendants were in possession of their mother's estate, she should, under this article, have brought her action before the ordinary tribunals. This court has had occasion to construe the provision of law relied on, and has held that it applies to estates accepted absolutely, or to those which, after having been administered upon by a curator, testamentary executor, &c., have come into the possession of the heirs. If the heirs are all of age, and accept the succession unconditionally, they are immediately put in possession of all the property, and are suable in the ordinary courts for their virile portion of the debts, in the same manner as though they were contracted by themselves. If some of the heirs are minors, the succession cannot be accepted by them, nor for them, without the benefit of an inventory. When thus accepted, it cannot be administered partially, but the whole estate must be placed under the management of an administrator, and no part of it comes legally to the possession of the heirs as such, until the administration be terminated, or a partition among the heirs be legally made. This, in our opinion, results from arts. 1002 and 1040 of the Civil Code. The first provides that, "when several heirs, in the same degree, are called to a succession, some may accept unconditionally, others under the benefit of an inventory; for the unconditional heir does not exclude the heir under the benefit of inventory." The second article declares that, "if there be several heirs to a succession, some of whom have accepted unconditionally, and others claim the benefit of the term for deliberating, the Judge of the place where the succession is opened, shall notwithstanding, cause an inventory to be made of the effects of the succession, and shall appoint an administrator to manage them, until a partition of the same be made among the heirs." Until such administration or partition takes place, the estate must remain and be administered under the authority of the

Court of Probates where it was opened, and all claims for money against it must, pursuant to art. 924, sec. 13, and art. 983, of the Code of Practice, be presented there for settlement in due course of administration. Civil Code, arts. 1002, 1040, 1051. Code of Practice, art. 992—acts of 1828, p. 156, sec. 13. 4 La. 202. 5 La. 384. 10 La. 17. But it appears to us that the claim of the recovery of a sum of money, should not have been engrafted on a proceeding, the sole object of which was to call upon the heirs to declare whether they accepted or refused the estate of their mother, and that no judgment should have been rendered thereon. The failure of the three defendants of full age to declare whether they accepted or renounced the succession, might well have justified a judgment, declaring them unconditional heirs, and liable to be sued as such. Civil Code, art. 1029. But as relates to the minor heir, no judgment of any kind could be rendered against her. She could not, under any circumstances be considered as having accepted the succession absolutely, when by law it is expressly provided, that she can accept it only with benefit of inventory. Civil Code, art. 346. She was then in the situation of an heir of age, declaring his acceptance of the estate, but claiming the benefit of an inventory. The succession should have been put under administration, as prayed for by the plaintiff herself, and as provided for by art. 1040, and the following, of the Civil Code. The judgment rendered below is then, *ultra petitum*.

It is therefore ordered, that the judgment of the Court of Probates be avoided and reversed; and that Barthelemy Fergus Dussau, Jean Baptiste Dussau, and Marie Louise Emilie, wife of Pierre Rillieux, be considered as having accepted the succession of the late Marie Louise Dussau as unconditional heirs; and it is further ordered, that this case be remanded to be proceeded in according to law, the costs of this appeal to be borne by the plaintiff and appellee.

L. Janin, for the plaintiff.

Peyton, and *J. W. Smith*, for the appellants.

ARTEMON HILL v. JOHN HALL.

Plaintiff cannot contradict by parol evidence, an act of mortgage on which he sues ; or prove anything beyond it.

Where notes secured by mortgage, delivered by the maker, have come again into his hands before maturity, the debt evidenced by them is extinguished by confusion.

C. C. 2214. By re-issuing such notes, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage securing them, which being only an accessory to the debt between the maker and the payee, was extinguished with it. C. C. 3252, 3374.

APPEAL from the District Court of the First District, *Buchanan, J.*

J. C. Clarke and Preston, for the appellant.

Benjamin, for the defendant.

MORPHY, J. This is an hypothecary action in which the plaintiff seeks to recover the amount of two promissory notes, for \$6000 each, drawn by John S. Walton, and endorsed by Joseph G. Walton and William Henderson, bearing date the 29th of December, 1835, payable two years after date, and secured by mortgage on property purchased by the defendant from the drawer, John S. Walton. The defence set up was, that the debt claimed by the plaintiff had long since been satisfied and extinguished ; that at, or since the maturity of the notes sued on, plaintiff had divers dealings, and business transactions with the drawer, John S. Walton, whereby he became indebted to the latter in an amount sufficient to extinguish the notes by compensation ; that John S. Walton having since become insolvent, and being indebted to the plaintiff, the present suit is instituted on these old notes, not because they are due, but because plaintiff hopes thereby to recover a debt which has since accrued ; and that these notes were either left in the plaintiff's hands, or have since been returned to him by John S. Walton, with a view to favor him in the collection of his claims against said Walton, at the expense of the defendant, who will be left with a mere personal recourse against Walton, who is hopelessly insolvent. To substantiate this defence, interrogatories were propounded to the plaintiff. His answers entirely negatived the allegations of the defendant, but disclosed the fact

that the notes sued on were received by the plaintiff from John S. Walton, the drawer, in July, 1836, in exchange for a note of \$10,000, drawn by the defendant. The latter then pleaded as a peremptory exception, that the notes sued on had been extinguished by confusion, the drawer having become the holder and owner of them, after they were made and issued, and before maturity. There was below a judgment of nonsuit, which on a new trial, granted at the instance of both parties, was changed into a final judgment for the defendant. The plaintiff has appealed.

On the second trial below, the plaintiff offered John S. Walton as a witness to prove that the notes in suit were accommodation notes, which had never been put in circulation, and had always remained in the possession of the maker. This testimony was opposed, on the ground that it would go to contradict the act of mortgage on which the suit was brought, and to which John S. Walton was himself a party. This objection having been sustained, the plaintiff took a bill of exceptions. The testimony was properly excluded. The act of mortgage, after stating that John S. Walton acknowledged himself to be justly indebted to Joseph G. Walton, in the sum of \$20,000, and had given him three promissory notes, payable to his order, one for \$8000, and two for \$6000 each, proceeds thus: "which notes, after having been paraphed by me, said notary, to identify them with this act, were delivered to the said Joseph G. Walton, who hereby acknowledges the receipt thereof. Now, therefore, to secure the full and punctual payment of the said notes at maturity, the said John S. Walton, moreover, declared that he does by these presents, specially mortgage and hypothecate unto the said Joseph G. Walton, his heirs, assigns," &c. The plaintiff, who claims under this act, and has made it the basis of his action, cannot be permitted to contradict it; nor can testimony be admitted to prove against, or beyond its contents. This act shows that these notes were delivered to the payee; and the notes themselves exhibit the endorsement of the payee to William Henderson, and of the latter to some other person. The evidence shows that they came back into the hands of the maker, some time after their date, and before maturity. From the moment John S. Walton became the owner of these notes, drawn by himself, the debt evidenced by them

was extinguished by confusion. Civil Code, art. 2214. But it is argued by the appellant's counsel, that the extinction of the debt between John S. Walton and Joseph G. Walton, did not incapacitate the former from contracting a new debt to Hill, and handing over to him, as evidence of it, the same notes, secured by mortgage on his property; that Hill could have recovered on these notes from John S. Walton, and can therefore pursue his property, which has since been sold subject to the debt. To this argument, the answer is obvious; that the notes thus re-issued by the drawer, undoubtedly, bind him, but that, by replacing them in circulation, he cannot revive the obligations of the other parties to the notes, or the mortgages on the defendant's property, which being only an accessory to the debt between the maker and the payee, became null and void as soon as the debt itself was extinguished. Civil Code, arts. 3252, 3374. It may further be answered, that the mortgage which exists on the property of the defendant, as a third possessor not bound for the debt, was given in favor of Joseph G. Walton, "his heirs and assigns." It can, therefore, be enforced only by a person claiming under Joseph G. Walton, whose debt the argument admits to have been extinguished. We have been referred to a passage in 2 Starkie, 286, in which it is said to have been held, that "a promissory note, paid, and re-issued before maturity, is available in the hands of a *bona fide* holder, without notice." However this may be, we cannot consider the plaintiff as a holder without notice. He received these notes from the hands of the drawer himself, long after their date, and with two endorsements on them, showing that they had been put in circulation. It is also worthy of remark, that the plaintiff took no steps to secure the liability of the two endorsers, and has thought proper to urge his claim on the defendant's property only about four years after the maturity of these notes.

Judgment affirmed.

HENRY BONNABEL V. FREDERIC RABENEAU.

Where a vendor allows the things on which he has a privilege, to be sold confusedly with a mass of other things belonging to his vendee, without making his claim, the privilege will be lost. C. C. 3195.

APPEAL from the District Court of the First District, *Buchanan, J.*

Schmidt, for the appellant.

Benjamin, for the defendant.

MARTIN, J. The plaintiff is appellant, from the dissolution of a writ of sequestration, which he had obtained to prevent the defendant from receiving an indemnity from a fire insurance company, in whose office the latter had effected an insurance on the contents of an apothecary and druggist's store, which were consumed by fire, on an affidavit that he was the vendor to the defendant of a considerable part of the merchandize so destroyed, had the vendor's privilege thereon, and was fearful that the defendant would part with and dispose of the indemnity to which he is entitled, to his, plaintiff's, injury and prejudice. The defendant's counsel has urged that the writ of sequestration was properly set aside, as the privilege of the vendor does not attach on the insurance money recovered for the loss of the object sold. *Thayer v. Goodale*, 4 La. 222. The plaintiff's counsel has relied on several authorities, which establish that in France, a distinction is made between marine and terrestrial insurances, the latter not being considered as *commercial transactions*, but as *acts of administration*, under which the insurance enures to the benefit of whoever has a lien or privilege on the property insured. *Quesnault Asses. Terrestres*, p. 162. *Journal du Palais*, vol. 22, p. 152. *Ib. An.* 1837, p. 235. *Boudousquié, De l'Ass. contre l'Incendie*. p. 116. He has also cited *Hammond on Insurance*, p. 23. *De-fo est v. Fulton Ins. Co.*, 1 Hall, 84; and has contended that art. 3152 of the Civil Code, which provides that privileges only exist in cases expressly provided by law, ought not to prevent us from recognizing the distinction on which he depends, although the privilege he claims be not mentioned in the Code. Admitting

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this, and his argument that the destruction of the property by fire may well be considered a sale by the assured, since it entitled him to full indemnity for the goods consumed; as the insurance was effected confusedly on the contents of a store which were worth more than two thousand dollars, while the goods sold by him did not amount to much more than one-fourth of that sum; it follows, that, as in the case of a sale of the whole store for that sum confusedly, no privilege would exist, since art. 3195, of the Civil Code provides that, "if the vendor allows the things to be sold confusedly, with a mass of other things belonging to the purchaser, without making his claim, he shall lose the privilege." An insurance confusedly made, must have the same effect, and destroy the privilege. Should the contents of the store be worth four thousand dollars, and one-half only of that sum be insured, could the plaintiff, while his debtor could recover not more than one-half of his loss, pretend to a whole indemnity for his?

Judgment affirmed.

HENRIETTE COUGOT v. ALEXIS FOURNIER.

Where one who has acted as curator of a succession, and failed to pay over funds which came into his hands as such, makes a voluntary surrender of his property to his creditors, under the act of 20th February, 1817, the surety on his bond as curator may oppose his surrender. C. C. 3026. The failure or neglect of a creditor to oppose the surrender, cannot operate a release of the surety. *Per curiam*: The effect of the surrender was only to discharge the debtor from imprisonment; it did not release him from the payment of his debts.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Canon, for the plaintiff.

Barthe, for the appellant.

SIMON, J. This appeal is taken from a judgment condemning the defendant to pay the sum of \$1500, which is the amount of another judgment previously obtained by the plaintiff against Jean Dufour, in his capacity of curator to the estate of Mare Fouché

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Cougot. The defendant's liability to pay the sum, is based upon his having subscribed the bond furnished by the curator, as surety for his good and faithful administration of the estate.

The record discloses the following facts : The deceased was the plaintiff's husband. The amount by her claimed is established by her marriage contract to be the value of a slave, by her brought into the marriage, and which, by the terms of the contract, became the husband's property. Her claim is therefore dotal ; and, as such, is secured by a tacit mortgage and general privilege on all the property of the estate. This was recognized by the judgment alluded to in the plaintiff's petition, ordering the curator to place her claim accordingly, on the tableau of distribution of the funds of the succession.

The inventory of the estate shows an active mass of \$3759 27, * including therein, the estimated value of a slave, who was in jail at the time the inventory was made ; and no evidence has been adduced to show, what became of said slave after the curator took possession of the estate. The only account exhibited by the defendant, as having been rendered by the curator, is one in which he accounts for three sums of money by him received, amounting together to \$1349 93, leaving a balance in his hands of \$1348 43. This account was homologated by the Court of Probates, *so far as not opposed*. The record contains, also, an opposition to the homologation of the curator's account, by divers creditors of the estate ; and, among others, by the plaintiff, upon which the judgment relied on, and referred to in her petition was rendered ; but the account itself, if different from the one already noticed, does not appear to have been produced, and nothing shows that any other account was ever rendered, or amended, in conformity with said judgment.

It further appears, from the written admissions of the parties, that the curator having made a cession of his property to his creditors, the following item figures in his schedule, among his passive debts : "*Succession Mare Fouché Cougot, mon compte avec elle, \$1348 43 ;*" and that the plaintiff did not oppose the insolvent Dufour's obtaining the benefit of the insolvent laws.

Under this state of facts and circumstances, the plaintiff's claim is resisted on two grounds. 1st. That the plaintiff ought to have

opposed the surrender made by the curator to his creditors, as the claim she had then against him, and for which she had obtained a judgment, was for a sum of money deposited in the curator's hands in a fiduciary character, and as curator of the estate ; that such an opposition would have deprived Dufour of the benefit of the insolvent laws, and prevented his discharge ; and that the plaintiff's failing to make the opposition, ought to have the effect of discharging the defendant from all responsibility as surety of the curator.

2d. That supposing the defendant to be liable, the plaintiff's claim must be reduced to the sum of \$723 68, being the balance in the hands of the curator after paying the privileges superior in rank to the plaintiff's.

I. We have been referred to the insolvent laws of the State, (act of 1817, sect. 25,) for the purpose of showing that Dufour was not entitled to the relief therein provided for ; and it has been strenuously contended, that it was the plaintiff's duty, in order to protect the defendant's rights as surety, and to enable him to exercise effectually his legal right of subrogation, to oppose the curator's surrender, on the charge of fraud resulting from his being an unfaithful depositary. We shall abstain from expressing any opinion on the question, whether Dufour was, or was not, under the facts and circumstances of his case, and within the meaning of the insolvent laws, an unfaithful depositary, and whether or not he was entitled to the relief by him sought for in making a surrender of his property to his creditors. This is entirely useless to the final determination of this cause, as, even supposing that his surrender could have been successfully opposed, it does not, in our opinion, lie in the mouth of the defendant, his surety, to complain of the omission of an act which he was himself at liberty to perform, if he thought it necessary for the protection of his rights. Under art. 3026 of the Civil Code, a surety may, even before making any payment, bring a suit against the debtor (*peut agir contre le débiteur*) to be indemnified by him, *when the latter has become a bankrupt*, or is in a state of insolvency. Pothier, Obligations, No. 442, 443. Thus, the surety was clearly competent to make the opposition, and to avail himself of all the objections which could have been made by the creditor ; and we agree

with the judge, *a quo*, in the opinion that the inaction of a creditor, who fails or neglects to make opposition to the surrender of property made by his debtor, so as to deprive him of the benefit of the insolvent laws, cannot operate the release of the surety. It is obvious, that the effect of the surrender did not go further than to discharge the debtor from imprisonment ; that he was not liberated from the payment of his debts ; that no real right was abandoned to the prejudice of the surety on the debtor's property ; and that, if the defendant has neglected to avail himself of his legal rights against his principal, the plaintiff cannot be made to suffer therefor.

II. The second ground is equally untenable. It does not appear that the curator has ever accounted for the whole amount of the inventory. Nay, the sums accounted for by him are included in, and form a part of the inventory, besides the value of the slave for which no account has been rendered. It was the duty of the curator to file a tableau of the general situation of the estate, and to class the creditors thereof according to their rank. Nothing shows, in this case, that the estate was insolvent ; and were we to take for granted the allegation of the defendant that there are other privileged debts of the succession, amounting to the difference between the sum accounted for by the curator, and the sum of \$723 68, to which, he contends, the plaintiff's claim must be reduced, which fact is not established by any proof, there would still be more than sufficient to satisfy both the plaintiff's and the other privileged creditors' claims. The inventory amounts to \$3759 27, and the aggregate of the privileged debts would not reach \$2200. The defendant is clearly liable, as surety, for the whole amount of the estate, which, from the inventory, appears to be solvent and fully sufficient to pay its debts ; and, as we said in the case of *Bonny & Baker v. Brashear*, 19 La. 386, no injury can result to the other creditors by decreeing the defendant to pay, to the extent of his liability, the claims of the creditors who may sue him on his bond. The fact of the succession's being solvent, satisfies us that the defendant, by paying the plaintiff's entire claim and the other privileged debts, will not be compelled to pay more than he really owes under his obligation. Again, the plaintiff having exercised her individual right of suing him on the

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bond, we cannot withhold from her the indemnity which it was intended to secure, in case the curator failed to comply with its conditions. See also 11 La. 330. 16 La. 73.

Judgment affirmed.

JEAN LOUIS DOLLIOLE, Administrator, v. JOACHIM AZÉMA and another.

Appeal dismissed, for want of proof of service of citation of appeal.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

A. Hennen, for the appellant.

Schmidt, for the defendant, moved to dismiss the appeal.

MORPHY, J. The appellee has prayed for the dismissal of this appeal, on the ground that he has not been cited. The record has been on file in this court since the 20th November, 1839, without any return of the service of a citation. On the day of the trial in this court the appellant filed a sworn declaration of A. D. Doriocourt, in which he states, that on examining the old docket of the Court of Probates, he finds an entry made on the 2d of July, 1839, showing that certain charges were made for filing a petition of appeal and order, for making a copy of the same, for a set of citations, &c. He further declares that these charges are generally made by him after the copies are issued, &c. Even were this paper to be considered as evidence, it only renders it probable that a citation of appeal was issued in the case, but does in no manner show any service of one on the appellee.

Appeal dismissed.

McCarty v. Lepaullard and another.

LOUIS BARTHELEMY MACARTY v. DESIRÉ LEPAULLARD and
another.

It appeared from a copy of a lease offered in evidence, that changes had been made in the original instrument, which were indicated in the margin, but not signed by the parties. *Held*, that until all parties had approved of the proposed changes, the contract was not valid, and consequently inadmissible.

APPEAL from the City Court of New Orleans, *Duvigneaud*, J.

BULLARD, J. The defendants are appellants from a judgment of the City Court, dispossessing them of property alleged to have been leased by them of the plaintiff, on account of their non-compliance with the conditions of the lease.

On the trial, the defendants opposed the reading of a copy of a lease, because there appeared to have been changes made, which are indicated in the margin, but which marginal notes had not been signed, or *paraphed* by the parties. A bill of exceptions was taken.

The court, in our opinion, erred. Until all the parties had approved the proposed change in the contract, it was not valid, and consequently was inadmissible.

It is therefore ordered that the judgment of the City Court be reversed; that the case be remanded with instructions not to admit the copy to be read in evidence, until it shall appear that all the parties have sanctioned the change; and that the plaintiff pay the costs of this appeal.

Bodin, for the plaintiff.

Desliix, for the appellants.

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another.

On a rule to show cause, why a writ of provisional seizure should not be set aside, evidence will be inadmissible to establish facts, alleged as grounds for the rule, which belong to the merits of the case, or relate to the truth of the affidavit, which no law authorizes the defendants to disprove.

Two appeals were brought up by the defendants in this case; the one taken from an interlocutory order, and the other from the final judgment of the Parish Court of New Orleans, *Maurian, J. Bodin*, for the plaintiff.

Deslax, for the appellants.

BULLARD, J. These two appeals from the Parish Court, together with one from the City Court, between the same parties, just disposed of, *ante* p. 425, were argued together by consent. They grow out of the same transaction, to wit, a lease, or rather a promise of a lease for a term of years, of the Conté Street Hotel. The proceedings in the Parish Court, commenced with a provisional seizure, and this appeal is from an interlocutory judgment, by which the court refused to set aside the seizure. The case proceeded upon its merits, notwithstanding the appeal upon the interlocutory order; it was tried by a jury, whose verdict was for the plaintiff for the rent claimed, and against the demand in reconvention; and the defendants have again appealed.

After the provisional seizure had been issued, the defendants took a rule on the plaintiff, to show cause why it should not be set aside: 1st. Because it was made without any lawful or useful object, and for the purpose of vexing the defendants. 2d. Because the facts set forth in the affidavit are not true, and the plaintiff had no cause to fear that the defendants would remove the furniture and property, or prevent the plaintiff from exercising any right he might have. 3d. Because it is not true that the defendants have entered into any lease with the plaintiff. 4th. Because the proceedings of the plaintiff, are vexatious and malicious, without previous amicable demand, and with a full knowledge that the defendants had an offset against the claim for rent, more than sufficient to extinguish and pay the rent claimed. 5th. Because the proceedings are otherwise informal and irregular.

This motion was overruled by the court; and on the trial of the rule, a bill of exceptions was taken to the refusal of the court to hear any evidence in support of the grounds set forth. This evidence was refused, it appears, because offered for the purpose of supporting the grounds of the rule, some of which belonged to the merits of the case, and others related to the verity of the allegations in the oath, which no law authorizes the defendants to dis-

Macarty v. Lepaullard and another.

prove. We are not satisfied that the judge erred. There was nothing very explicit or precise in the grounds assumed; and it is difficult to separate the grounds, for setting aside the provisional seizure, from the general merits of the defence to the action.

An answer having been filed to the merits, the cause was submitted to a jury; and it only remains to inquire what was the issue to be tried, and whether there is error in the verdict and judgment.

The answer of the defendants denies that they owe the plaintiff any thing. They aver, that so far from owing any thing, he is indebted to them \$20,000, for damages. That the defendants, having agreed to rent the Conté Street Hotel, for five years from the 1st of November, 1840, at an annual rent of \$4500, the plaintiff promised to deliver the hotel in good order, together with certain articles of furniture specified in an inventory, and in the meantime authorized the defendants to take possession and make the necessary preparations, the plaintiff promising to make them a lease for five years, on their giving Letermelier as surety for the rent. That in consequence of the premises, they began in October, 1840, to fit up the house, and laid out \$10,000; yet Macarty had failed and neglected to comply with his promises: 1st. by not delivering the articles comprised in the inventory; 2d, by not making repairs which he was bound to do; 3d, by not executing a lease as he had promised, they, having been compelled to bring suit against him, to force him to execute said lease. They admit that they ultimately consented to accept a lease for three years instead of five, and that it was executed accordingly. They therefore pray that Macarty may be condemned in reconvention to pay eight hundred and eighty-seven dollars and eighteen cents, the amount of necessary repairs made by them to the hotel; one thousand dollars for his refusal to furnish the articles specified in the inventory, and the further sum of eight thousand dollars damages, resulting from the neglect and refusal of Macarty, or his agent, to execute the lease.

The verdict was in favor of the plaintiff for the amount of rent due, and no damages were awarded to the defendants.

Several bills of exception were taken during the progress of the trial, which it becomes our duty to examine. By the first it

Scudder v. Paulding.

appears that the defendants offered to prove that certain articles to be furnished by the plaintiff, and which were missing, were worth \$1000; but the court very properly ruled that their value was immaterial in the cause.

The next bill relates to the *paraphing* of certain changes in the lease, by the defendants. All that inquiry became, in our opinion, useless, by the admission of the defendants, that they had consented to the modification of the lease, and that Macarty had signed it accordingly. It was quite immaterial, in this case, whether the lease was for five, or three years, the monthly rent was the same.

Another bill of exceptions shows that the defendants offered to prove by witnesses, that the premises rented were not in good order at the time of the alleged lease, and that repairs were made of the value of \$887 18. This was objected to by the plaintiff, on the ground that it is not demanded in the pleadings, nor under the contract, and that such proof cannot be made under articles 2689, and 2690 of the Civil Code. The evidence was properly excluded. It is true, that the two articles relied on relate to the obligation of the lessee at the expiration of the lease; but the account of repairs, annexed to the answer, does not show that they were of such a character as to be at the charge of the lessor.

The case submitted to the jury lay within very narrow limits, and the court and jury seem to have properly appreciated the pretensions of the parties.

Judgment affirmed.

JOHN SCUDDER v. CORNELIUS PAULDING.

Plaintiff leased from defendant an hotel, "with all the appurtenances, and all the household furniture and fixtures belonging to the same." The hotel was supplied with gas fixtures; but on application to the Gas Company, they refused to permit the introduction of any gas, on the ground that an amount was still due for gas supplied to a former tenant for which defendant was responsible, and that, according to their rules, no gas could be supplied to the building until the arrears were paid. Defendant having refused to pay the whole amount claimed by the company, a suit was pending to recover it. *Per Curiam.* The lease entitled plaintiff to call on the Company for gas, on offering to pay for it; but nothing shows that defendant bound

Scudder v. Panlding.

himself that such supply should be furnished. If the gas was improperly refused, plaintiff's remedy was against the company. The defendant caused him no injury by exercising his right of resisting a claim which he deemed illegal.

The omission of a lessor to make the necessary repairs to the premises, will not, where the rent is sufficient to enable the tenant to make them, authorize the rescission of the lease, or a suit for damages. Under art. 2664 of the Civil Code, the lessee may, on the refusal or neglect of the lessor, himself cause them to be made, and deduct the cost from the rent due, on proving that the repairs were indispensable, and the price paid by him just and reasonable.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
Grivot and Roselius, for the appellant.
Preston, for the defendant.

MORPHY, J. The plaintiff seeks to annul a lease for one year executed to him by the defendant, on the 1st of November, 1840, and claims damages to the amount of \$6000, on two distinct grounds or allegations, to wit: 1st. That in the building rented by him, and known under the name of the Planters' Hotel, there are gas fixtures attached to it for the purpose of introducing gas to the bar room, and other parts of the house; that the use of these fixtures was one of the privileges transferred to him by the defendant; but that, on application repeatedly made to the Gas Light and Banking Company, they have constantly refused to supply the gas, alleging that there was due for gas by the Planter's Hotel, a sum of \$800, which amount the defendant had assumed to pay; and that until the same was paid, they would not furnish gas to the house, without which, it is alleged to be almost impossible to carry on the business of hotel-keeping, &c. 2d. That the Planters' Hotel, instead of being in a good tenantable condition, is entirely out of repair; that when it rains, it is impossible to remain in the rooms in the third story, in consequence of leaks in the roof; that plaintiff, although notified of the condition of the house and of the consequences likely to follow from it, has constantly neglected and refused to make the necessary repairs; that by the leakage of the roof the plaintiff has suffered considerable injury, and has lost many boarders who have left his house in consequence thereof. The answer denies any indebtedness on the part of the defendant to the Gas Light and Banking Company, or any engagement, or undertaking on his part, to put the plaintiff in possession of the right to obtain gas from the Company, and

pleads the general issue. There was a judgment below for the defendant, and this appeal was taken.

I. The evidence shows, that before and after executing the lease, the plaintiff frequently applied to the Gas Light and Banking Company to light with gas the premises leased from the defendant, but that it was answered that this could not be done, because the Company had a claim for gas furnished to the Planters' Hotel, whilst kept by a former tenant, which debt had been assumed by the defendant, and that under the rules of the institution no gas could be furnished to the house until the claim was satisfied. It further appears, that a suit is pending in the District Court in which the Company claims of the defendant the \$800, but that the latter resists the claim, averring that he owes only \$100, which, he says, he has always been ready and willing to pay, and which he has tendered to them. The lease speaks of no right, or privilege, transferred to the plaintiff in relation to the gas necessary for lighting the premises. It mentions as being leased, "the Planters' Hotel, with all the appurtenances thereto belonging. and with all the household furniture and fixtures belonging to the same, and detailed in a schedule annexed to it." This entitled the plaintiff no doubt to call upon the Company for a supply of gas, on offering to pay for it; but nothing in the lease shows any obligation or undertaking on the part of the lessor to secure to the lessee that the Gas Company should furnish him with gas. If they improperly withhold from the plaintiff the gas which, under their charter they are bound to supply to all those who call for it, he cannot look to the defendant, who causes him no injury when he exercises his legal right of resisting a claim which he does not admit to be correct, and which the evidence in this case does not show that he actually owes.

II. In relation to the situation of the house, the evidence shows that in several rooms in the attic story, the water penetrated from the roof and occasioned dampness, and even wetness in some of them, and that these rooms could not be conveniently occupied by boarders in rainy weather. On the other hand, it is in evidence that the roof of the Planters' Hotel, was entirely made anew in the year 1838, and was repaired a few days before the plaintiff took possession of it. That the winter of 1841, was an extremely wet

Bertholi v. Deverges and others.

and rainy season, and that most of the houses in town leaked that year. The plaintiff has not shown, that by reason of the situation of the rooms in the attic story, which were the only ones affected by the leaks, any boarders were prevented from taking lodgings at the Planters' Hotel, or that any boarders left the hotel in consequence of it. But even had the plaintiff suffered the injury he alleges, he would have no right to sue for the rescission of his lease, or for damages. For the protection of tenants, the law has allowed them the privilege of making, themselves, the repairs which become absolutely necessary during their lease, and of deducting the cost of such repairs from the rent, when the owner refuses to make them. The Civil Code, art. 2664, says: "If the lessor do not make the necessary repairs in the manner required in the preceding article, the lessee may call upon him to do it; if he refuse or neglect to make them, the lessee may himself cause them to be made, and deduct the price from the rent due, on proving that the repairs were indispensable, and that the price which he has paid was just and reasonable." Under this provision of law the plaintiff had clearly the right to employ workmen, and have the repairs made at the expense of defendant. The rent which was at the rate of \$625 per month, was amply sufficient to cover the amount of the costs of such repairs. Upon the whole, we can see nothing which should induce us to reverse the judgment appealed from.

Judgment affirmed.

NICHOLAS BERTHOLI v. HELOISE DEVERGES and others.

APPEAL from the District Court of the First District, *Buchanan*, J.

Latour, and *Roselius*, for the plaintiff.

Canon, for the appellants.

SIMON, J. The plaintiff in this action, seeks to recover the price of a female slave by him purchased of the defendants' ancestor, on the 10th of November, 1838. The disease with

which the slave is alleged to have been afflicted at the time of the sale, is a pulmonary affection of a chronic character, called by the physicians "*phthisis pulmonaris*," or consumption, which caused her death, in July, 1839.

The defendants deny the allegations on which the plaintiff's claim is based. They aver that at the time of the purchase, the slave was free from any redhibitory sickness, and that she was not afflicted with the disease described in the petition.

The case was tried by a jury who gave their verdict in favor of the plaintiff for the sum of \$855, the amount of the purchase; whereupon judgment was rendered accordingly against the defendants, who, after having vainly attempted to obtain a new trial, took the present appeal.

The evidence adduced on the trial of this cause appears somewhat contradictory as to the time of the first existence, or appearance of the disease. The contradictions arise more particularly from the opinions of the physicians who were called to examine the slave after the sale. One of them says, that he discovered the malady the first time that he saw the girl; and the two others testify that when they were called in consultation, they were of opinion that she was not afflicted with any pulmonary disease. They all agree, however, upon the malady being of a chronic character; and one of the two physicians whose opinion was, that the disease did not exist at the time of the consultation, states that the lungs of the slave, when she died, were *in the state of a well confirmed phthisis or pulmonary consumption*; that *confirmed phthisis is of a chronic character*; and that in this case, *the lungs were totally disorganized*. We are aware of the difficulty of relying with any degree of certainty, upon the opinions of physicians called transiently in consultation. We know that "*doctors will differ*;" and their science, being an occult one, it is not astonishing that the variety of systems by them respectively adopted, should cause necessarily, and oftentimes, a great difference in their opinions. However this may be, it is certain that the death of the slave, was occasioned by the disease which was recognized by the plaintiff's family physician on his first examination of the subject; and in order to arrive at the truth with regard to the origin of the malady, and the time of its first appear-

ance, we shall proceed to a close examination of the facts and circumstances testified to by all the witnesses.

It appears that the first time Madame Dias saw the slave after the sale, she appeared to be sick, and that the witness, three or four days after the sale, *noticed that the girl was afflicted with a cough*. Another witness, Paturzo, who used to go often to the plaintiff's, went to see him three days after the sale, and he testifies that *two or three days after the sale, the slave coughed a good deal, complained of her chest, and had a bad color*. Dr. Vionet, who was plaintiff's family physician, was called about the middle of December, (four or five days after the sale,) saw the girl, and was not pleased with her appearance. She had, he states, too narrow a chest, and her face showed that she suffered. Sometime after, he discovered that she had incipient symptoms of phthisis, and suggested to call a consultation of physicians, advising the plaintiff to select those who were the family physicians of the defendants. The consultation took place, and the witness was of opinion that the disease originated from a pulmonic affection which must have dated *four or five* (the word is left blank in the record,) previous to the consultation. This consultation took place in December, 1838. The witness further says, that he has no doubt that the disease did not exist when he first saw the girl; that she was regularly attended by him, and well treated and taken care of by the plaintiff, and not allowed to work. She died with the malady which he discovered when he first saw her; and he adds, that it must have existed *five or six months before*. This disease, in his opinion, was of a chronic nature.

Dr. Fortin, who was the family physician of the defendants at the time of the sale, testifies that having been called in consultation with Drs. Vionet and Tricou, to examine the slave at the plaintiff's, he was of opinion that she was not affected with a pulmonary disease. He states the circumstances on which his opinion was based; explains the course and progress of the malady in certain cases; and says, that *he had treated the girl while she was in possession of the defendants for a cough which yielded to his treatment, and left her in good health*. This was in 1838. The sickness at the defendants' lasted a long while, but she was not so sick as to require daily attendance from him. He adds, that it

is a fact that in winter, phthisis takes a more rapid course ; that he does not believe that on the 18th of December, 1838, the slave had the pulmonary disease ; and at all events, if she had it, the means which he used failed to indicate the existence of the malady. He states further, that he does not think that *six months* had elapsed between the time he last saw the slave at the defendants' and the consultation.

Dr. Tricou recollects very well that, at the time of the consultation, *a point in one of the slave's lungs was affected so that she did not breathe well* ; but without having a clear indication of the existence of the disease, he could not certify that she was consumptive. If she had been so, they would have known it. The affection of the point was caused by a fluxion which had been cured by Fortin. He insists also upon the girl's not having any symptom of phthisis, when he saw her, and gives his reasons upon which he then founded his belief.

The facts and circumstances of the case, disclosed by the evidence, which we have endeavored to recite in substance, were, it seems to us, well calculated to induce the jury to believe, notwithstanding the opinions of two of the physicians, that the slave was at the time of the sale affected with the disease which caused her death. Indeed, the testimony would leave very little doubt in our minds, that the malady recognized by Dr. Vionet, when he first saw the girl a few days after the sale, was a continuation of the sickness for which she had been treated by Dr. Fortin, who perhaps mistook the momentary relief which he procured her, for a complete cure. Certain it is, as we have already said, that she died with a *well confirmed phthisis*, in the opinion of the physicians who examined her lungs after her death ; that the malady made its appearance within a very few days after the sale, from which time, the girl lingered, and her disease grew worse and worse until she died. The circumstance of her having been treated *for a cough*, which lasted a *long while*, when she was in the possession of the defendants, and about six months previous to the consultation, coupled with the other circumstances relative to the appearance of the malady, to the affection of the lungs that prevented her breathing freely as stated by Dr. Tricou, and to its progress after the sale, militate strongly in favor of the opinion of

 Gontier v. Thomas.

Dr. Vionet, that the disease, chronic in its nature, must have existed five or six months before. The jury thought so, and so did the Judge of the District Court in overruling the defendants' motion for a new trial; and we have not been able to discover any reason to be dissatisfied with their judgment.

Judgment affirmed.

MICHEL GONTIER v. PIERRE FREDERIC THOMAS.

Art. 2456 of the Civil Code, which declares that, "where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and, with respect to third persons, the parties must produce proof, that they are acting in good faith, and establish the reality of the sale," recognizes the validity of the sales of moveables against third persons, where the seller retains possession by a precarious title. To give effect to this article, and to the provisions of arts. 1917 and 2243 of the same Code, the cases put in art. 2456, must be considered as exceptions to the rule laid down in arts. 1917 and 2243.

APPEAL from the City Court of New Orleans, *Duvigneaud, J.*

SIMON, J. The evidence shows that, on the 23d of January, 1841, the plaintiff purchased of one Boiteux, a shoemaker's shop, (*fond de boutique de cordonnier*,) for the sum of one hundred and fifty dollars, in cash. On the 19th of March, following, Pierre Frederic Thomas obtained a judgment against Boiteux, for the sum of four hundred dollars, on which an execution was issued, which was levied upon the aforesaid establishment; whereupon the plaintiff obtained an injunction to prevent the sale thereof, praying that the defendants might be ordered to discontinue the seizure of the property, and that Thomas might be condemned to pay him three hundred dollars damages.

The defendant pleaded the general issue, and further alleged, that the sale relied on by the plaintiff was not made *bona fide*, but is simulated and fraudulent, and was made after the institution of his, Thomas', suit against Boiteux.

Judgment was rendered below in favor of the defendant, annul-

ling the sale made by Boiteux to the plaintiff, dissolving the injunction, and condemning the plaintiff and his surety on the injunction bond, to pay *in solido* to the defendant, Thomas, twenty-five dollars special damages, and twenty per cent. on the amount of the judgment enjoined. From this judgment, the plaintiff has appealed.

The evidence further shows, that the sale from Boiteux to the plaintiff was really made on the day which it purports. Three witnesses were present, and saw the money counted by the plaintiff. One of them testifies, that Gontier agreed to give Boiteux thirty dollars a month, to continue to work in the shop ; and that the latter was compelled to sell his shop for the purpose of paying for a month's rent, which he owed, and for several of the articles by him sold to Boiteux. It appears, moreover, by the testimony of the owner of the house in which the shop is kept, that the house was leased to the plaintiff on the 21st January, 1841. The testimony of several other witnesses proves, that Gontier is a goldsmith by trade, lends money on pawn, and does all he can to make money ; that his industry is not limited to his goldsmith's trade ; that about the time of the sale and afterwards, he purchased leather from several persons ; that he paid for it, and also paid for some leather which had been sold to Boiteux. It is also in evidence that, for two years past, Boiteux has not worked much for his own account, and that he worked for a German. One of the witnesses says, that he had shoes made in that shop since the sale, and that he has always considered Gontier, as the owner of the establishment.

On the other hand, it has been shown, that Boiteux's sign remained on the door of the shop, until March, 1841 ; that Boiteux was in the shop at work when the notice of judgment was served upon him ; that he was seen there acting as owner until the time of the seizure ; and that the shop was estimated as being worth between \$500 and \$550. The seizure took place about three months after the sale.

The question which grows out of the above facts is, whether a sufficient delivery of the objects sold has been made by Boiteux to the plaintiff, so as to avoid their being seized by the vendor's creditors, and whether the plaintiff has produced sufficient proof

that the sale was a real and *bona fide* one. Under art. 1917, of the Civil Code, it is provided, that "if personal property be transferred by contract, but not delivered, it is liable in the hands of the obligor to seizure and attachment, in behalf of his creditors." See also, art. 2243. Art. 2456, informs us, that "in all cases where the thing sold remains in the possession of the seller, because he retains possession by a precarious title, there is reason to presume, that the sale is simulated, and, with respect to third persons, the parties must produce proof, that they are acting in good faith, and establish the reality of the sale." This is the purport of the decisions relied on by the appellee's counsel. 6 Mart. 418. 4 La. 340. 12 La. 375. And 7 Mart. N. S. 675, in which latter case, it was held, that art. 2456, recognizes the validity of sales of moveables against third persons, when the seller retains possession by a precarious title, and that to give effect to the two provisions, we must consider the cases put in the article last cited, as exceptions to the rule contained in the two preceding ones. We do not feel disposed to change this construction, which appears to us to be a sound one; and under its application, we cannot hesitate to decide, that if the plaintiff has brought himself within the meaning of art. 2456, his sale must prevail.

Now, with the facts and circumstances disclosed by the evidence, it seems to us, that the plaintiff has satisfactorily established the reality of his sale; and that, if any fraudulent intention can be attributed to the vendor, the vendee does not appear to have participated in it. It is true, that he is a goldsmith by trade, and a pawn-broker, and it is also true, that Boiteux continued to work in the shop; but these circumstances are sufficiently explained by the facts, that the plaintiff employed Boiteux at the rate of thirty dollars a month, for his services, and that his industry not being limited to his goldsmith's trade, it was proper, and even necessary for him to employ a good workman, known as such; and it is not astonishing, that Boiteux's sign should have been preserved on the door of the shop. The transaction took place about two months previous to the judgment obtained by Thomas; the price of the purchase was paid in the presence of three witnesses; the object of the sale has been sufficiently accounted for; the house in which

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the shop is kept, was leased by the plaintiff about the time of the sale; the leather used in the shop was subsequently purchased, and paid for by him; the value of the contents of the shop had been very much augmented during the period that elapsed between the sale and the seizure: and we cannot believe, that the plaintiff would have taken upon himself to incur the responsibility of the rent of the house, to disburse his money in order to supply the shop with the necessary materials, and to run the risk of losing his advances, if he had not really been the owner of the establishment. The agreement which took place between the parties immediately after the sale, shows that Boiteux retained possession of the shop by a precarious title; but this fact, sustained and corroborated by all the other circumstances which followed the transaction, is, in our opinion, equivalent to a legal and sufficient delivery.

With this view of the case, the judgment appealed from must be reversed, and ours must be in favor of the plaintiff, with a reservation of his right, if any he has, to sue the defendants for the damages which he may have experienced in consequence of the seizure complained of.

It is therefore ordered, that the judgment of the City Court be annulled, and reversed; that ours be in favor of the plaintiff; that the injunction obtained by him be made perpetual, reserving to said plaintiff his action, if any he have, against the defendants for such damages as he may have suffered in consequence of the seizure of his property; and that the defendant, Thomas, pay the costs in both courts.

Budd and Rousseau, for the plaintiff.

De Courmont, for the appellant.

THE NEW ORLEANS GAS LIGHT AND BANKING COMPANY v.
RANDALL CURRELL and others.

Where, in an action to rescind a sale, on the ground that it was made with the view of giving a preference to certain creditors of the vendor, who is stated to be insolvent, the petition does not allege that the purchasers knew that their vendor was

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insolvent, and that the latter had not property sufficient to pay the debt of the petitioner; the sale cannot be avoided.

Art. 1982 of the Civil Code is applicable exclusively to a particular class of cases, in which the only alleged ground of nullity is an undue preference given to one of the creditors of an insolvent; while art. 1989 applies to all other contracts by which creditors are injured.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

G. Strawbridge for the appellants.

Benjamin, curator ad hoc, for the defendants.

SIMON, J. This is a revocatory action. The plaintiffs represent, that they are judgment creditors of R. Currell and James Currell in the sum of \$9923. That R. Currell with a view to favor and give a preference to John Currell & Sons, did, on the 29th of August, 1840, convey to the said firm, six valuable lots of ground situated in the city of New Orleans. That with the same view, a suit was instituted in March, 1841, by the said John Currell & Sons against R. and J. Currell, in which judgment was rendered for the sum of \$88,074 33. And that the said R. Currell was, at the time of said acts, and is still insolvent; and that said acts are injurious to the petitioners' rights and in fraud of them. They pray that the acts may be declared null.

A *curator ad hoc* was appointed to the absent defendants, who filed peremptory exceptions founded on law to the plaintiffs' claims, as follows: that the plaintiffs' cause of action is prescribed, and that even if the facts stated in the petition were true, no cause of action exists in favor of the plaintiffs, against the defendants.

The exceptions were maintained, the suit dismissed, and the plaintiffs have appealed.

This suit was filed on the 26th of February, 1842. The allegations of the petition only go to charge R. Currell with the legal fraud of having given an undue preference to John Currell & Sons, by the sale made to them of six lots of ground. The plaintiffs' complaint, with regard to the said sale, does not extend further. It is not even alleged that the purchasers of the lots knew that their vendor was in insolvent circumstances, or that the plaintiffs' debtor has not property sufficient to pay the debt of the complaining creditors.

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We think the Parish Judge did not err. We have often said that art. 1982 of the Civil Code, is applicable to a particular class of cases, in which the only alleged ground of nullity is an undue preference given to one of the creditors of an insolvent, whilst art. 1989, is applicable to all other contracts by which creditors are injured.* 3 La. 26. 14 La. 322. 16 La. 373. This action comes clearly within the provisions of art. 1982; and the defendants' plea of prescription must prevail.

We are also of opinion that with regard to the judgment complained of in the petition, the plaintiffs have shown no cause of action. No collusion is alleged to have existed between the parties. Nothing shows that the amount of the judgment was not due. No fact is disclosed from which any suspicion of fraud or collusion can be inferred; and we know of no law that prohibits a creditor from suing and obtaining judgment against his debtor, even in insolvent circumstances, for the purpose, at least, of liquidating his demand. It was the duty of the plaintiffs to bring their case within the object and requisites of the law. Civil Code, arts. 1966, 1979, 1980, 1981 and 1984.

Judgment affirmed.

THE BANK OF PORT GIBSON v. GLENDY BURKE and others.

A debtor of plaintiffs', both being non-residents, consigned a lot of cotton to defendants who were commission merchants in New Orleans, for sale. In the bill of lading,

*Art. 1982. No contract made between the debtor and one of his creditors for the purpose of securing a just debt, shall be set aside under this section, although the debtor were insolvent to the knowledge of the creditor with whom he contracted, and although the other creditors are injured thereby, if such contract were made more than one year before bringing the suit to avoid it, and if it contain no other cause of nullity than the preference given to one creditor over another.

Art. 1989. The action given by this section is limited to one year; if brought by a creditor individually, to be counted from the time he has obtained judgment against the debtor; if brought by syndics, or other representatives of the creditors collectively, to be counted from the day of their appointment.

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which was filled up by one of the latter, it was mentioned, that "the proceeds shall be subject to the order of the plaintiffs." Defendants having sold the cotton, attached the proceeds in their own hands for a debt due to them by the consignor. *Held*, that defendants having received the cotton in virtue of the bill of lading, and sold it, were bound to carry out their agency, and to account to plaintiffs for the proceeds.

APPEAL from the District Court of the First District, *Buchanan, J.*

Micou and *F. B. Conrad*, for the appellants. The contract between Conger and the defendants, as established by the bill of lading, was a *stipulation pour autrui*. Civil Code, arts. 1884, 1896. 4 Mart. N. S. 668. 5 La. 316.

Grymes, for the defendants.

BULLARD, J. The Bank of Port Gibson represents, that one John B. Conger, being largely indebted to them by notes, and willing to make provision for the payment by a shipment of cotton to New Orleans, the proceeds when sold to be applied accordingly, did ship one hundred and fifty bales of cotton to the defendants, Burke, Watt & Co., who undertook to sell the cotton, and hold the proceeds subject to the plaintiff's order. That according to the tenor of the bill of lading, which was filled up by one of the defendants, the cotton was to be sold for account of the plaintiffs, and the proceeds held subject to their order; but the plaintiffs allege, that the defendants received the cotton, sold the same, and instead of holding the proceeds subject to plaintiffs' order, neglect and refuse to pay the same over to their order.

The defendants set up a special exception and plea in bar. They allege that the same John B. Conger, who appears to be the shipper of the cotton, being largely indebted to them, they instituted suit against him by attachment, and caused the same 150 bales of cotton to be seized and attached as his property, and that such proceedings were had, that the said cotton was duly declared and adjudged to be subject to their attachment. They, therefore, conclude that the plaintiffs cannot maintain the present action.

In case this exception should be overruled, they further answer by denying all the allegations contained in the petition, and averring that the plaintiffs never had any right, title, or possession,

in, to, or of the said 150 bales of cotton, nor any lien or privilege on the same, but that the same was, in law and justice, liable to the attachment and judgment of the respondents, and was justly and legally decreed, to be applicable to the defendants, attachment, and to the satisfaction of the judgment recovered in the Parish Court. They further plead, that the plaintiffs in their corporate capacity, and under their charter could not, under the circumstances of this case, acquire any such right, title, interest, or lien as they set up in their petition.

The District Court sustained this plea, and gave judgment for the defendants. The plaintiffs have appealed.

The facts are simple and undisputed. Conger called at the Bank, and informed the Cashier, that he had one hundred and fifty bales of cotton ready to ship for their account, the proceeds to be credited on his notes to the Bank. The Cashier, being short of clerks at the time, requested Conger himself to make the shipment, and take the bill of lading. This was assented to, and the name of Bogart mentioned as the general agent of the Bank in New Orleans, but he was not instructed to ship to him. When the boat stopped to take in the cotton, Watt, one of the house of Burke, Watt & Co., was on board, and solicited the commissions on the sale of the cotton for his house. Whereupon the bill of lading was filled up by Watt, containing these expressions: "*proceeds of the above to be subject to the order of the Port Gibson Bank.*" The cotton was received in New Orleans, sold by the house, and afterwards the proceeds attached in the hands of the consignees, to pay a debt due to themselves by Conger.

If any other than the consignors had levied the attachment, it might be perhaps a fair subject of discussion, whether Conger, by taking such a bill of lading and handing it over to the Bank, had so far placed the cotton beyond his control as to protect it from attachment by his creditors. Be that as it may, and admitting it as doubtful, yet we are clear, that the defendants, having received the cotton in virtue of the bill of lading, and having sold it, were bound to carry out their agency, and to account for the proceeds to the plaintiffs. The attachment added nothing to the defence of Burke, Watt & Co. According to the argument of their counsel, compensation took place as soon as they had sold the cotton, and

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the obligation to pay over was extinguished by a liquidated debt due to them by Conger. This argument supposes that they were to pay or account to Conger, whereas they had come under a positive engagement to pay over to the Bank, for whose benefit the shipment was made. They dealt with Conger as the agent of the Bank, and cannot now be permitted to go counter to the engagement contained in the bill of lading.

The only exception to the capacity of the plaintiffs, is a denial of their corporate capacity to acquire such a title, interest, or lien as they assert in this case. Their authority to contract in Mississippi, where this arrangement appears to have been entered into, cannot be questioned under their charter; and no good reason has been shown why it should not be carried into effect here. Good faith requires that it should be.

The judgment of the District Court is, therefore, avoided and reversed; and it is further adjudged and decreed, that the plaintiffs recover of the defendants, *in solido*, the sum of six thousand six hundred and fifty-one dollars and seventy-five cents, with interest at five per cent. from judicial demand, to wit, February 27, 1840, until paid, with the costs in both courts.

JAMES CORLIS v. EDWARD A. TYLER.

Where the record is not certified as containing all the evidence introduced on the trial, and there is no statement of facts, bill of exceptions, or assignment of error apparent on the record, the appeal must be dismissed.

APPEAL, from the District Court of the First District, *Buchanan, J.*

Kennicott, for the plaintiff.

Preston, for the appellant.

MORPHY, J. This appeal must be dismissed. The transcript filed in this court by the appellant is not certified as containing all the evidence adduced on the trial. There is no statement of facts, no bill of exceptions, and no assignment of error apparent

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on the face of the record, which can enable us to examine the matters passed upon by the Judge below. Code of Practice, arts. 586, 896, 897. 6 Mart. N. S. 127. 3 La. 294. 6 La. 144.

Appeal dismissed.

SAMUEL S. TURNER for himself, and as Executor of William F. Jones, deceased, v. WILLIAM LOCKWOOD.

Where the evidence is so contradictory, that the Court cannot determine to whom the property in dispute belongs, the plaintiff must be nonsuited.

THE plaintiff is appellant from a judgment of nonsuit rendered by the District Court of the First District, *Buchanan, J.*

G. Strawbridge, for the appellant.

McKinney, for the defendant.

MARTIN, J. The plaintiff complains, that the defendant took possession of eighteen mules and two horses the property of himself, and the deceased, for which he claims judgment. The defendant pleaded the general issue, and averred, that the animals were his property. There was judgment of nonsuit, and the plaintiff has appealed. The evidence, by documents and witnesses, is voluminous and contradictory. The judgment informs us, that the District Court was unable to decide on the ownership of the property in controversy, and that in the state of uncertainty in which the evidence left the case there was no other way of deciding it, but by ordering a nonsuit. We are not able to do more.

Judgment affirmed.

The State v. The Clinton and Port Hudson Rail Road Company.

THE STATE v. THE CLINTON AND PORT HUDSON RAIL ROAD
COMPANY.

APPEAL from the District Court of East Feliciana, *Johnson, J.*
A. M. Dunn, District Attorney of the First Judicial District,
for the State.

Muse and Merrick, for the defendants.

BULLARD, J. This is an appeal from a judgment pronouncing the forfeiture of the charter of the Clinton and Port Hudson Rail Road Company, at the suit of the State. The case has been submitted to us by the appellants as well as by the Attorney General, without any arguments, or reference to authorities. The legal causes for forfeiture are so clearly made out, that we are at a loss to imagine why any appeal was taken.

Judgment affirmed.

MARTIN GRIDLEY and another v. CONNER.

In an action between partners for the final settlement, and partition of the effects of the partnership, no powers which may have been conferred during its progress on any one of the partners as a receiver, or for liquidating the affairs of the concern, can change their relative position and ultimate responsibilities towards each other. A partner cannot single out a particular transaction, and obtain a judgment against his co-partners thereupon. He can only require a final liquidation of the affairs of the partnership, and for this purpose any one of them may require, that all the matters in controversy shall be decided upon by a jury.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. This is an action originally brought by two of the partners of the firm of Conner, Gridley & Co., against the third, in order to put an end to the partnership previously to the time fixed for its expiration by the articles of partnership, and for a final settlement of its concerns. The defendant, Conner, is

charged by the plaintiffs with various fraudulent acts, such as making false entries, and withdrawing money from the concern. A sequestration was obtained in the first instance, and all the books and effects of the partnership were sequestered.

At this stage of the cause commenced an incessant skirmish of rules upon rules, which has rendered the proceedings very complex and confused, and in which the parties seem to have forgotten their original position towards each other. In order to understand the question presented for our solution, it is necessary to recapitulate these different proceedings.

Even before Conner had filed his answer he was, by consent of parties, appointed receiver, with authority to pay off the debts of the firm, as well as to collect what was due, and to render an account whenever required.

On the next day he filed his answer, denying all the allegations of fraud and misfeasance, but charging, that the plaintiff had greatly injured the firm, and especially by the present violent and unjust measure. He however unites in the prayer, that the partnership may be dissolved and liquidated.

The parties, in an action of partition or final liquidation among partners, must be regarded as standing equal before the court. Whatever qualities they may have assumed, or may have been conferred on any one of them, either for the purpose of liquidation or as receiver, cannot be regarded by us as changing their relative positions, and ultimate responsibilities towards each other.

Auditors were appointed who made a report, which appears to have been overlooked in the subsequent proceedings, after being homologated.

The receiver, Conner, was appointed on the fourth of June, and on the tenth of the same month, a rule was taken on him by the plaintiffs to show cause, why he should not, on the 16th, file an account of what he had done as receiver, showing : 1st. What cotton he has sold, to whom, and for what price : 2d. What moneys he had received, and from whom ; and 3d. What letters he had received directed to Conner, Gridley & Co., their purport, and contents. On the 17th Conner filed an account, and fourteen letters. In this account he admits a balance due Conner, Gridley & Co., of \$4375 45.

At this stage of the proceedings one of the plaintiffs, Whitehead, takes a rule on Conner, the receiver, to show cause why the books, papers, &c., belonging to the late firm of Conner, Gridley & Co., should not be delivered to him, (he being one of the parties most interested, and the largest part of the partnership effects belonging to him,) for the purpose of liquidating and settling the affairs of the late partnership.

This was in substance a motion by one of the partners to deprive another who had been appointed by common consent, of the receivership, or the authority to collect the outstanding debts due to the partnership, and to apply the proceeds to the payment of the debts, and who had given satisfactory security for the faithful performance of the trust.

This rule was opposed by Conner, who denied the allegations therein made, and on the ground, that he had already been appointed to liquidate the affairs of the firm. The rule was, however, made absolute, and Whitehead appointed receiver, on giving bond to the Judge.

Shortly afterwards Kelly & Conyngham were appointed receivers, it would seem by consent of all parties concerned, and took charge of the books and papers.

Still the war of rules was carried on against Conner, who had been once appointed receiver, and had reported a balance due by him. On the 23d March, 1841, the plaintiffs' counsel obtained an order on him to file in court on the 27th, a report of all the sums received and paid out by him, and of the sums due to individuals for the proceeds of cotton sold by him as receiver, and also to file the correspondence between him and Baring Brothers, in relation to the shipment of cotton by Conner, Gridley & Co., and the account of sales, with all letters he may have received addressed to Conner, Gridley & Co.

On the 31st of March, Conner, in obedience to this order filed a detailed account of his proceedings, and disbursements, showing a balance in his favor of \$1486 06. He also filed a long list of letters.

On the 12th of May, 1841, Kelly & Conyngham, the receivers, were authorized to pay any debts of the partnership, out of any funds which might come into their hands.

No further notice being taken at the moment of the report of Conner, the counsel of Kelly & Conyngham, the receivers, suggesting to the court that Conner had received and collected a large amount from the creditors of Conner, Gridley & Co., particularly \$3000 and upwards from Brigham & Jessup, which he refuses to pay over to them, who alone were authorized to receive the same, obtained a rule on him to show cause why he should not file in court a full account of all moneys he had received and collected belonging to Conner, Gridley & Co., since the appointment of Kelly & Conyngham, and previous thereto, and also why he should not pay over the money which he may have in his possession thus collected.

Conner answered to this rule, that he had received no moneys for the firm since the account filed by him, and he denied all the allegations in the rule.

Some evidence was taken on this rule, and it was finally made absolute, and Conner ordered, within ten days, to file in court a full account of all moneys, notes, and merchandize, he had received and collected, belonging to the late firm of Conner, Gridley & Co., since the appointment of Kelly & Conyngham, as receivers, and previous thereto, and that he pay over to said receivers any money which he may have in his hands.

An alleged disobedience of this order led to the imprisonment of Conner, for a contempt of court. A new account was finally rendered early in November, and the order of imprisonment was softened down to a fine of fifty dollars.

Again, on the 10th of November, the counsel of Kelly & Conyngham, took a rule on Conner, to show cause, why he should not pay them the money he has received belonging to the late firm of Conner, Gridley & Co., according to the testimony of Thomson, given on the 30th June, preceding, to wit, \$2500, and upwards, from Brigham & Jessup, \$2000 from Stafford, \$1000 from Thomas, and a note of Cammack for about \$400.

The next incident we meet with, unexpectedly, is a trial by jury; but what the issue was, it is impossible to tell, except so far as may be gathered from a bill of exceptions, from which it would appear, that the defendant insisted, that the jury should pronounce upon the whole matter in controversy, but the court restricted the

inquiry to the questions : 1st. Whether the partnership shall be dissolved : 2d. Whether the defendant be guilty of fraud as charged in the petition : and 3d. Whether the plaintiffs have injured the commercial standing of the house. There was a verdict for the defendant. It was set aside and a new trial granted, which has never been had.

At this stage of the proceedings, Kelly & Conyngham filed their account as receivers, and prayed to be discharged. This was accordingly done ; and, by an *ex parte* proceeding, Whitehead was appointed receiver in their stead, with full power to take into his possession all the books and property of every description belonging to Conner, Gridley & Co., and to collect all the debts due them, upon his giving bond, with satisfactory security, in the sum of five thousand dollars ; and he was ordered to report his proceedings to the court every fifteen days, and to keep a bank book as receiver.

The new receiver, soon after his appointment, takes a rule on his partner Conner, the former receiver, to show cause, why he should not pay over to him the funds in his hands belonging to the concern of Conner, Gridley & Co.

Conner, in answer to this rule, denies that he has any funds in his hands belonging to the firm, but alleges, that he is, on the contrary, largely its creditor, as he will be ready to prove on a final liquidation of the matter, and he prays for a *trial by jury*. Whereupon, on the same day, a new, or rather an amended rule was taken by Whitehead, in his individual capacity, and as receiver, on Conner to show cause, why he should not pay over to Whitehead, in his said capacity, or to the judgment creditors of the partnership, the sum of five thousand five hundred and fifty-six dollars and three cents, the amount received by him, for which he is accountable as receiver, according to the account and statement now filed. This account is the one first rendered by Conner after his appointment.

This rule was made absolute, for \$4844 54, and this is the judgment from which the appeal is taken.

Thus we find one partner, Gridley, entirely lost sight of ; the other two not coming to a trial of the cause, as is shown by the pleadings, but by a series of petty attacks, and counter attacks,

protracting the litigation to a fearful extent, and to little purpose. It is too well settled to be now questioned, that one partner cannot single out a particular transaction, and obtain a judgment against his co-partner thereupon. He can only require a general balance, and a final liquidation. That which cannot be done directly cannot be permitted to be attempted indirectly. To apply the principle to the case now before us, if one of the plaintiffs had at first demanded a judgment in his favor, against another, for a specific sum in the present action of partition, it is certain that he must have failed. But it will be said, that he has now become the *receiver*. To this it may be answered, that the other partner is also a receiver. Both have given bonds, and we have looked in vain for any order made contradictorily with Conner, which invests his partner with the extraordinary power assumed in this case. The parties seem to have forgotten that the original issue made up between them remains undecided; and that the subject matter of the rule decided on by the District Court, sprung into existence after the suit was brought. It is impossible to do justice between the parties by such a course of proceeding. The whole case, in our opinion, ought to be sent to arbitrators or amicable compounders, to settle the partnership concerns between the parties upon principles of good faith; and all the questions presented by the record, and particularly whether the loss of the cotton speculation shall be sustained by Conner alone, or by the firm, and what damage the house may have sustained by Conner's neglecting to obtain payment of Brigham & Jessup and of Stafford, of certain debts due by them to the firm, together with other minor questions. But if the parties will not assent to this course, then in our opinion the steps which the court ought to take are obvious. Conner, in answer to the last rule, prays for a trial by jury of all the matters involved in the controversy, and alleges, that he will owe nothing on a final settlement. He is, in our opinion, entitled to such a trial of the whole matter. An action of partition in a country parish, conducted as this has been, would last probably for twenty years, and might not be decided at last. It is time to try the cause upon the pleadings, and upon its merits, and to remember, that very rarely is it regular to give judgment for sums of money in favor of one party against another,

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on mere incidental rules to show cause, or upon motion, especially in actions of partition. It is only a final balance which they owe, and for which a final judgment can be given.

The judgment of the District Court is therefore reversed, and it is further ordered, that the case be remanded for a new trial by jury, unless the parties choose to submit all the matters in controversy to arbitration; and that the costs of the appeal be paid by the appellee.

Elmore and *W. W. King*, for the appellant.

Roselius, contra.*

**Roselius*, for a re-hearing. The opinion of the court declares "that the parties must be regarded as standing equal before the court, in an action of partition or final liquidation among partners. Whatever qualities they may have assumed, or may have been conferred on any one of them, either for the purpose of liquidation or as receiver, cannot be regarded by us as changing their relative position and ultimate responsibilities towards each other."

This is an error. The action for the dissolution and liquidation of the partnership is still pending and undecided in the court below, and has not the remotest connection with the case now before this court. The defendant is not sought to be made responsible for any transaction of the partnership. He is called on to render an account of a special agency. And whether he be named receiver or liquidator, cannot exempt him from the operation of the rules of law, by which the obligations of mandataries are governed. It is difficult to perceive any connection between a proceeding for such a purpose, and a suit for the dissolution and liquidation of the partnership. The case presents the question, whether an agent or trustee is bound to account for and pay over funds, which he has received by virtue of his agency or trust; a question arising after the institution of the suit for the settlement of the partnership, and which therefore cannot be at issue in that action. Suppose the agency had been conferred on a stranger, could it be pretended that the question of his accountability was involved in the main action? And if not, what reason can be adduced for adopting a different rule with regard to one of the partners? The very perplexity and confusion complained of, will be the inevitable consequence of huddling together matters so entirely distinct and separate. It is said that "Conner is also a receiver." This is a mistake. By reference to the record it will be found, that on the 10th of March, 1841, Conner's own counsel applied to the court for the appointment of H. F. Cantzon, and Kelly & Conyngham, as receivers in the place of Conner. In pursuance of this application by Conner's counsel, Kelly & Conyngham, were invested with the same power to collect and pay the active and passive debts as had been dele-

gated to Conner. On their resignation Whitehead was appointed, without the slightest opposition or objection on the part of any one; and up to the present time no one has ever complained of this last appointment. All parties were fully aware of its necessity. The proceedings against Conner, for the purpose of compelling him to render an account of his agency, were never resisted on the ground that Whitehead's appointment was irregular. No bill of exceptions can be found on the record, nor is there any assignment of errors. Under such a state of facts it is not perceived how this court can take notice of any supposed or real informalities in the proceedings in the court below. Where is the evidence in the record that the defendant insisted on having the present case consolidated with the main action? Can this court, under the well established rules of practice, afford relief to parties, when they do not complain, and present their complaint in such a shape as the law requires? The answer to the rule taken, on the 5th March, in which Conner prays for a trial by jury, is of no importance whatever, because that rule was abandoned and never acted on. The judgment appealed from was rendered on the rule taken on the 12th of March. No objection to the trial of that rule was made, either on the ground that the defendant was entitled to a jury trial, or for any other reason. But even if it be conceded, that the prayer for a trial by jury can be applied to the rule of the 12th March, it is clear, that it cannot avail the defendant. By the 17th section of the act of the 10th February, 1841, it is provided, that "*the cases now pending in which a trial by jury is asked for, shall be stricken from the jury docket, unless the compensation to be allowed to jurors is advanced by the party demanding a trial by jury.*" See session acts of 1841, p. 17 and 18. The compensation to be paid to jurors was not paid in this case; consequently the defendant lost his right.

The proceeding by rule was not objected to. The cause was tried on its real merits, by consent of both parties; and now in the Supreme Court the objection is first made. This court has no right to correct any real or supposed irregularity in the proceedings of the court of the first instance, unless it be shown either by way of an exception, or a bill of exceptions, that the party urged the objection in the court below; neither of which was done in the present case. If there was any thing in the objection itself, it is too late now to urge it.

It is true, as the court correctly observes, that one partner cannot single out a particular transaction and obtain a judgment against his co-partner thereupon. From this, however, it does not follow, that an agent, or a trustee, cannot be compelled to render an account of his trust, or agency, to another trustee or agent, who has superseded him.

Re-hearing refused.

Montfort v. Her Husband.

MARIE EULALIE MONTFORT V. HER HUSBAND.

Immoveables settled as dowry, cannot be alienated during the marriage, except in the cases provided for by arts. 2338, 2339, 2340, 2341, of the Civil Code. C. C. 2337.

But when made in conformity to law, the sale is definitive and irrevocable, forever freeing them from any dotal rights of the wife.

The purchaser of dotal property legally alienated, has nothing to do with the investment of the proceeds; the husband alone has the administration of the dowry. C. C. 2330. All that the purchaser has to do is to pay the price to the husband, who may act alone for the preservation or recovery of the dowry. The proceeds stand in lieu of the property itself, and become dotal. C. C. 2327. If the husband fail to reinvest the dotal funds, the wife will have a legal mortgage on his immoveables, and a privilege on his moveables, for their restitution. C. C. 2355, 2387.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

R. Preaux, for the plaintiff.

Bodin, for the appellants.

SIMON, J. This case presents the following facts: On the 26th of October, 1829, a marriage contract was passed between the plaintiff and the defendant, by which the wife brought into the marriage, as a part of her dotal property, the undivided half of a house and lot situated in the city of New Orleans, which half was estimated at the sum of fifteen hundred dollars, with the stipulation that the estimation should not have the effect of transferring the right of ownership to the husband. In May, 1830, certain proceedings were instituted by the plaintiff's co-proprietor, for the purpose of obtaining the division of the aforesaid property by a sale thereof, to be made in the manner prescribed by law; whereupon, after issue joined, a judgment was regularly rendered, ordering the undivided property to be sold, and the proceeds thereof to be divided between the parties in equal portions. The property was offered for sale at public auction accordingly, after having been duly appraised, and it was finally adjudicated to one Barzac, for the sum of \$3050, payable in two equal instalments, at six and twelve months credit from the day of the sale, and a notarial act thereof was passed on the seventh of August, 1830. The act of sale stipulates, that as to the portion coming to the plaintiff for her undivided moiety in the proceeds of the property sold, the notes are

to remain deposited in the hands of the vendee, until the amount thereof (\$1525) be reinvested by the wife or by the husband, or until a judgment of the Parish Court be rendered, ordering the vendee to deliver the notes to the wife. On the 21st of the same month, another act was passed, by which the two notes were delivered by Barzac to the plaintiff, who immediately delivered them to her husband, who acknowledged that he had received them from his wife, and that he became responsible towards her for the amount thereof. The price of the wife's dotal property, was thus paid over to the husband.

On the 4th of June, 1841, the defendant, being indebted to the opponents Dolliole and Boisdoré, in the sum of \$2000, for endorsements which they had furnished him, gave them a special mortgage on certain slaves, to secure the said endorsements.

In March, 1842, the plaintiff obtained a judgment of separation of property against the defendant, liquidating her dotal rights at the sum of \$1855, inclusive of the amount received by her husband from Barzac; and an execution having been issued, it was levied upon certain slaves and other property of the defendant's, including therein the two slaves mortgaged to the opponents. The property was sold by the sheriff, and produced a sum of \$4951 13, out of which, after applying the sum of \$2972 85, to the satisfaction of a claim secured by legal mortgage in favor of the defendant's minor child, anterior to that of the plaintiff, there remained a balance of \$1978 28, subject to be applied to the satisfaction of the plaintiff's judgment. The proceeds of the sale of the two slaves mortgaged to the opponents, amounted to the sum of \$1600.

Dolliole and Boisdoré, mortgage creditors of the defendant, made opposition to the sheriff's paying over to the plaintiff the balance of the proceeds of the sale of the property, on several grounds, the most important of which, and indeed the only one which was insisted on in the argument, is; that the plaintiff cannot be allowed to exercise any hypothecary claim against her husband's property, for the amount by him received from the sale of her dotal property, as by law she is entitled to the restitution of the property itself; which, being dotal, could not be alienated, and

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which she may recover back in kind, in consequence of the decree of separation of property by her obtained.

The inferior judge overruled the creditors' opposition, and they have appealed.

The question here presented appears under the facts of the case, to be a very simple one; as, from the view we have taken, its solution depends merely on the clear and precise terms of several articles of the Civil Code, which, in our opinion, are not subject to any two interpretations. It is a well known rule, under our laws, that immoveables, settled as dowry, cannot be alienated during the marriage (Civil Code art. 2337) except in the cases provided for by arts. 2338, 2339, 2340 and 2341. This last article provides that, dotal immoveables may be sold, with the authorization of the judge, at public auction, after three advertisements, &c. "when the immoveable is held undivided with a third person, and the same is ascertained not to be susceptible of being divided;" and "in all such cases, what remains unemployed, out of the proceeds of the sale, above the necessities which have been the occasion of the sale, shall remain dotal effects, and shall be laid out as such to the benefit of the wife." It is not pretended in this case, that the legal formalities were not strictly complied with; indeed, the record shows that the requisites of the law were regularly followed, and we must consider the alienation of the plaintiff's dotal property, being one of the cases permitted and authorized by our Code, as complete and binding upon her. If so, how could she sue to recover back the property, and how could she be entitled to its restitution? Its alienation was required for the purpose of putting an end to a community of right, or of ownership, which one of the co-proprietors was entitled to dissolve under the well known rule that "no one can be compelled to hold property with another" (Civil Code, art. 1215;) and its subsequent recovery by the plaintiff, would necessarily bring it back to the state of indivision or community, which, by permitting its alienation, it was the object of the law to avoid. This, in our opinion, cannot for a moment be countenanced; for the law, instead of affording to the innocent purchaser of dotal undivided property the protection which, from the exception to the general rule, and from the obvious intention of the legislator, ought to be

extended to him for the security of his title, would often be used as a snare to extort from him the most unjust and iniquitous advantages. This is so clear to our minds, that we deem any further comment on the articles of our Code unnecessary; and we conclude that the sale under consideration, made with and in conformity to the requisites and formalities of the law, must be considered as definitive and irrevocable, and forever free from the exercise of the dotal rights of the plaintiff.

It has been urged, however, that it was the duty of the purchaser to see that the funds proceeding from the sale, were reinvested or laid out as dotal funds for the benefit of the wife; and that this requisite not having been complied with, the sale cannot have any greater effect than that of any other dotal property. We have been unable to find any thing in our law that would favor any such pretension. Art. 2341 does not say by whom the investment is to be made; and we are not prepared to say that the purchaser of the dotal property thus legally alienated, had any right to interfere in the investment of the wife's funds, and in the administration of her dotal effects. This properly belongs to the husband, who alone has the administration of the dowry (Civil Code, art. 2330;) and it seems to us, that all that the purchaser has to do, is to pay the amount of his purchase to the husband, who, according to our law, may act alone for the preservation or recovery of the dowry. The proceeds of the dotal property stand in lieu of the property itself; they become dotal, and as such, they must be given or paid over to the husband. Civil Code, art. 2327. Arts. 2355 and 3287 of the Civil Code, which say, that "the wife has a legal mortgage on the immoveables, and a privilege on the moveables of her husband, for the restitution of her dowry, and *for the reinvestment of the dotal property* sold or alienated by the husband," corroborate the view we have taken on this subject, and show clearly that the dotal rights of the wife, are so secured by the legal mortgage and privilege thus allowed her, that if the husband fails to reinvest her dotal funds, his own property will immediately become subject to the reinvestment, and will, as such, under the mortgage, stand in lieu of the property itself, to secure the replacing of her dotal effects, (*pour le remploi des biens dotaux.*)

Now, in this case, the rights of the opponents are far posterior to the legal mortgage of the plaintiff. When they accepted the special mortgage given by the defendant, they knew that the property was subject to the rights of his wife; nay, they expected to obtain her renunciation, and had prepared their act accordingly. They knew that her dotal property had been sold in a legal manner; that the sale was perfect under our law; that the payment of the proceeds had been made to the husband. At all events, it was easy for them to have ascertained that the plaintiff's dotal funds had been put in the possession of the defendant, that they never had been reinvested, and that the husband's property was legally mortgaged to secure the replacing or the reinvestment of those dotal funds.

We are aware that the question, as discussed by the counsel, was presented on the supposition that the plaintiff was entitled to sue for the restitution of her dotal property, and to recover it back to the prejudice of the purchaser; and we have carefully examined the several authorities quoted and commented on by the counsel, as they favored the pretensions of their respective clients. But, as we have already said, they cannot have any bearing upon the real question at issue; and we must abstain from expressing any opinion on the question whether a married woman, whose dotal property has been illegally sold during the marriage by the husband, can be allowed to exercise her hypothecary action on her husband's property to the prejudice of his other mortgage creditors, when she may cause the alienation to be set aside after the dissolution of the marriage, or after the separation of property. Or, in other words, whether the wife has a right to select her action for the recovery of her dotal effects, in such manner as to abandon her action *ad rem*, and maintain and ratify the illegal alienation, to the prejudice of the husband's mortgage creditors. This question, which would perhaps arise out of art. 2342 of our Code, is inapplicable to this case—does not seem to grow out of the record—and does not, in our opinion, require any further investigation. It is clear, that, as was very properly observed by the judge, *a quo*, in his written opinion, the action to annul the sale, would be of little or

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no avail to the plaintiff; and she cannot be compelled to do a vain thing.

Judgment affirmed.

THE UNION BANK OF LOUISIANA v. JAMES ERWIN.

APPEAL from the District Court of the First District, *Buchanan, J.*

H. R. Denis, for the plaintiffs.

J. P. Benjamin, for the appellant.

MARTIN, J. The defendant is appellant from the dissolution of an injunction, which he had obtained, to stay proceedings on a claim of the Union Bank, on the ground that it ought to have been considered by the Board as a part of the *dead weight*, and as such renewable, on the defendant's application, under the 3d section of an act of the Legislature, approved on the 5th of February, 1842. The counsel for the Bank resisted the pretensions of the defendant on the grounds: 1st. That the claim was not one of those to which the part of the law invoked by the defendant is applicable, being a claim for the price of a plantation, purchased by the defendant, while the section referred to is applicable only to debts and demands on loans and discounts. 2dly. That the defendant had not entitled himself to a renewal, by complying with the requisites of the section of which he seeks to avail himself. The counsel for the Bank has, in his opening and reply, supported his first proposition with great force. His arguments were powerfully opposed by the adverse counsel, who was stopped by us, because we did not consider that the case called for our opinion on this proposition, as the view which we took of the other rendered it useless. It does not appear to us that the First Judge erred in concluding that the defendant had not complied with the requisitions of the act of Assembly. It appears that instead of doing so, he sought the indulgence of the Bank, on other terms, to wit, a delay until the coming in of his crop, or

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the 25th of December following. This proposition the Board accepted, with a small modification, to wit, restraining the delay to the 1st of December. To this modification, the acquiescence of the defendant results from his payment of interest up to the day to which the Bank had restricted its indulgence, with the costs of the protest. On the failure of payment on that day, the defendant's note was put into the hands of the attorney for the Bank, and on being called on by that officer, the defendant applied to have his debt considered as a part of the *dead weight* of the Bank. It appears to us that the First Judge correctly concluded that he was too late.

Judgment affirmed.

CHARLES LEVISTONE V. THOMAS BARKSDALE BONA.

Plaintiff, to whom a slave had been mortgaged by defendant, having seized the slave in the hands of a third person, the order of seizure and sale was enjoined by the latter; and the opposition, being tried in the absence of the opponent's counsel was dismissed, and the injunction dissolved. Another writ of seizure and sale having been issued, was again opposed by the same party. *Held* that the dismissal on the first trial must be viewed as a nonsuit, and not as furnishing ground for the plea of *res judicata*, the opponent occupying the position of a plaintiff, and being bound to support his opposition by proof.

Defendant executed a mortgage on a slave to secure the payment of a note given to plaintiff, the act stipulating that the mortgagor should, on paying a part, be entitled to renew the note for the balance, for a limited time, but there was no provision extending the mortgage to the new note. There was a part payment, and renewal for the balance; plaintiff giving up to defendant the original note. Plaintiff afterwards presented the second note to the notary, and obtained from him a certificate that the original note had been presented to him, that plaintiff had declared that he had received the part payment and taken the second note in renewal, and that he, the notary, had *paraphed* it for the purpose of identifying it with the transaction. This certificate was not recorded at the Mortgage Office. Defendant sold the slave, under a certificate from the Recorder of Mortgages, that a mortgage existed on the slave to secure the payment of the first note. On an opposition by the purchaser to an order of seizure and sale taken out by plaintiff: *Held*, that the mortgage did not extend to the renewed note; that the purchaser was not bound to look beyond the certificate of the Recorder of Mortgages; that plaintiff, by surrendering the original note, without taking any steps to give notice to third

persons of the mortgage claimed for his new note, gave the purchaser reason to believe that the original note and the mortgage were both extinguished; that nothing connects the second note with the mortgage; and that neither the note, nor the certificate of the notary, are such authentic evidence as authorize the issuing of an order of seizure and sale.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
Chinn and Elwyn, for the appellant.

Roselius, for the opponent.

MORPHY, J. An order of seizure and sale, taken out by the plaintiff under a mortgage executed to him by the defendant, was levied on the slave Hester and her child, in the possession of Virginia Wilkinson Thompson, who had purchased them from the defendant. She enjoined the proceedings on the ground that the debt, to secure which the mortgage was granted, had long since been paid and satisfied; and she annexed to her opposition the note described in the mortgage as being the evidence of that debt. In answer to this opposition the plaintiff averred that the opponent, when she purchased, well knew of the existence of this mortgage, and that the sale of the defendant to her was fraudulent on the part of both vendor and vendee, and intended to deprive him of his lien on the slave Hester. When the case came on for trial, the counsel for the opponent not being present, the court heard the evidence adduced by the plaintiff, and dismissed the opposition. Another writ of seizure and sale having been issued, was again opposed on the same grounds. The plaintiff pleaded *res judicata*, and the general issue. The second opposition having been sustained, and the injunction made perpetual, the plaintiff has appealed.

The Judge below considered the dismissal of the opposition on the first trial in the light of a nonsuit, and as furnishing, as such, no ground for the plea of *res judicata*. We cannot say that he erred. The opponent stood in the position of a plaintiff, and was bound to support her opposition by proof. As she failed to do this, the judgment of dismissal was not improperly viewed as one of nonsuit. 5 Mart. N. S. 120. 7 Ib. N. S. 362. 2 La. 429.

On the merits, the evidence shows that to secure the payment of a note of \$2000, given for money loaned to him, the defendant

executed to the plaintiff, on the 23d of March, 1838, a mortgage on the slave Hester and several others. It is stipulated in the notarial act, that the mortgagor shall have the right of renewing this note at maturity, for a term not extending beyond the 14th of June following, on his making a payment of \$500. The \$500 were paid at maturity by the defendant, and a new note was made for \$1500, bearing date the 26th of May, 1838, and payable sixteen days after date. On the 11th of July following, a further sum of \$419 was paid by the defendant. On the 16th of the same month, plaintiff presented the note of \$1500 to the notary who had drawn up the act of mortgage, and procured from him a certificate in which the notary declares, that on the 26th of May preceding, he, the plaintiff, had presented to him the original note of \$2000, and had declared that in pursuance of the agreement to renew contained in the said act, he had received \$500 in part payment, and had taken in renewal the said note of \$1500. The notary further declares, that he made on the note a paraph "*ne varietur*," bearing date the 26th of May, 1838, to identify it, as he expresses it, with the transaction. Had this document, informal as it is, been recorded at the office of the Recorder of Mortgages, it might have conveyed to third persons some notice, that although the note of \$2000 had been surrendered to the defendant, the mortgage yet subsisted for \$1500; but no registry was made of it, and the only evidence in the record even of the recording of the original mortgage, is to be found in the sale annexed to the opposition, which recites that according to the certificate of the Register of Mortgages, there is a mortgage in favor of Charles Levistone to secure the payment of a note of \$2000, but that the said note had been deposited in the hands of the notary for the purpose of raising the said mortgage, within the shortest possible delay, at the expense and costs of the seller.

With such evidence before him, the Judge, we think, decided correctly. The mortgage was given only to secure the payment of a note of \$2000, and no provision was made extending it to any renewal. Admitting that between the parties, it could be construed so as to cover the renewal agreed to, the purchaser of the slave Hester was not bound to look beyond the certificate of the Recorder of Mortgages, which makes no mention of the sti-

Talamon v. Ytasse and another.

pulated right of renewing. When the defendant availed himself of this right, the plaintiff should either have kept in his possession the original note, or have required its deposit at the notary's office until the note given in renewal was paid; or, he should have taken an inscription to secure the payment of the latter note. By surrendering the note of \$2000 to his debtor, without taking any steps to give notice to third persons of the mortgage which he now claims for his renewed note, the plaintiff had given the opponent every reason to believe that the note of \$2000, the only one mentioned in the certificate of mortgages, was extinguished, and with it the mortgage intended to secure its payment. Nothing connects the note of \$1500 with the mortgage executed on the 23d of March, 1838; and neither the note, nor the certificate delivered by the notary on the 16th of July, 1839, presents such authentic evidence as should have authorized the issuing of an order of seizure and sale, especially when third parties were to be affected by it.

Judgment affirmed.

OCTAVE TALAMON and another v. CHARLES YTASSE and another.

A sequestration can be issued only in cases in which it is expressly allowed by law. Plaintiffs in an action to annul a sale of land made by their debtor to a third person as in fraud of their rights, having no lien or privilege upon the property, cannot cause it to be sequestered, pending the action, on the ground that they are apprehensive that the purchaser will sell or incumber it for the purpose of defrauding them and the other creditors of the vendor; nor could they, were the land still in possession of their debtor. C. P. 375. Acts of 7 April, 1826, sect. 9, and 20 March, 1839, sect. 6.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Train, Beauregard, and Buisson*, for the appellants.

Nautré and J. F. Pepin, for the defendants.

MORPHY, J. The plaintiffs are appellants from a judgment setting aside an order of sequestration, which they had obtained

The Philadelphia Bank v. Lambeth and others.

in this case, the inferior Judge being of opinion that he had issued the order improvidently in the first instance. They had brought a revocatory action against the defendants, to annul and avoid, as made in fraud of their rights as creditors of Charles Ytasse, the sale of a house and lot by the latter to his co-defendant, L. C. Allaume, and had made oath that they were informed and verily believed that the said Allaume, taking advantage of the simulated and fraudulent sale made to him, was about to dispose of or incumber said property, in order to deprive the creditors of Ytasse of their rights on the same, &c.

We do not think that the Judge erred. Sequestration is a remedy which courts of justice can grant only in those cases where the law expressly gives it. The plaintiffs have no lien or privilege on the property, and the facts they allege do not bring them within any of the cases provided for by law. If the property were yet in the possession of their debtor, they could not sequester it, on the ground that he might sell or mortgage it to injure his creditors. Code of Practice, art. 275. B. & C.'s Dig. p. 156, sect. 6; and p. 774, sect. 9.

Judgment affirmed.

THE PHILADELPHIA BANK v. WILLIAM M. LAMBETH and others.

It is no objection to the introduction in evidence of an act of the Legislature of another State, extending the charter of a Bank for the purpose of proving its existence as a corporation, that the original act of incorporation is not produced. The act offered, certainly proves *rem ipsam*—that the extension of the charters was granted.

Acts of the Legislature, or extracts from the executive minutes of another State, attested by the Secretary of State, and accompanied by a certificate from the Governor, under the great seal of the State, declaring that the person who attests them is the Secretary of State, and that his attestation is in due form, are sufficiently proved.

Where the object is to prove the existence of a corporation in another State, it is no objection to the admissibility of the testimony of a witness offered to prove that he had corresponded with the corporation, that the act of incorporation would be better evidence.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

C. M. Jones, for the plaintiffs.

W. M. Randolph, for the appellants.

MARTIN, J. The defendants who were sued on their acceptance of a bill of exchange, pleaded the general issue, but admitted their signature. They, however, denied the existence of the plaintiffs as a corporation. There was judgment against them, and they have appealed. The case is before us on a bill of exceptions to the introduction :

First. Of an act of the Legislature of the State of Pennsylvania, of the 28th of March, 1823, entitled "an act to extend the charter of the Philadelphia Bank;" on the ground that the act of incorporation ought to have been produced, and that the said act had not the proof to give it the force and effect of law.

Second. Of another act of the same Legislature, approved the 1st of April, 1836, entitled, "an act to extend the charter of the Philadelphia Bank." This act was objected to on the same grounds as the preceeding.

Third. Of an act of the same Legislature, approved the 25th day of March, 1824, entitled "an act to re-charter certain banks." This act was objected to on the last of the grounds aforesaid.

Fourth. Of an extract of the executive minutes of the commonwealth of Pennsylvania, attesting the notification of the acceptance of the Philadelphia Bank, of the act of 1836. This extract was objected to on the grounds, that there was no evidence that the person certifying the same, was the keeper of said records, or minutes, nor that his attestation was in due form; and, that the actual acceptance of the extension of their charter by the Bank, would have been better evidence.

Fifth. Of the testimony of a witness, offered to prove the existence of the corporation, establishing his correspondence with the plaintiffs as late as the year 1839, as being inferior and secondary to the act of incorporation.

It does not appear to us that the court erred. The acts extending the charter, certainly prove that it was originally granted. All the acts are proved by the certificate of the Governor of the commonwealth, under the great seal of the State; that the person who attests the acts is Secretary of State and that his attestations are in due form. The executive minutes, are certified by

Lyons v. Jackson.

the Secretary of State, under his seal of office, as carefully transcribed and compared with the records in his possession. The proof of the acceptance of the extension of the charter by the Bank, results from the evidence of notice thereof having been given by the President of the Bank to the Governor, as shown by the extracts from the executive minutes; and the testimony of the witness, who corresponded with the Bank, in the year 1839, establishes that it was then in operation, and is cumulative evidence of the acceptance of the extension of the charter.

On the merits, the defendants admitted their acceptance of the bill of which the plaintiff is holder.

Judgment affirmed.

HARRIS LYONS v. JACKSON.

Action for the price of certain articles of furniture, and answer that plaintiff had sold the furniture to a third person, from whom defendant has purchased it. Bills made out in the name of such third person, and receipts for notes given in payment by him as so much cash, were produced by defendant. Plaintiff having offered to introduce witnesses to prove that the sale was made to defendant, the latter objected to the admission of the evidence as contradicting the proof under the plaintiff's own hand; and on the ground, that the petition did not aver that the sale was made for her use. *Held*, that the evidence was inadmissible; and judgment of nonsuit.

APPEAL from the District Court of the First District, *Buchanan, J.*

Greiner, for the appellant.

Van Dalsen and *Goold*, for the defendant.

MARTIN J. The plaintiff is appellant from a judgment of nonsuit. He claimed the price of certain articles of furniture sold to the defendant. She pleaded the general issue. The case is before us on a bill of exceptions taken by the plaintiff's counsel to the rejection of witnesses offered to prove the allegations in the petition, to wit: the sale of furniture by the plaintiff to the defendant, which was opposed on the ground that the furniture had been sold by the plaintiff to Shannon, as shown by the production of the bills of sale signed and receipted by plaintiff. It was admit-

ted that the signature of the plaintiff to the bills was genuine, and that the articles of furniture, embraced in those bills, were the same which had been attached by the plaintiff as the property of the defendant. The defendant contended :

First. That parol evidence could not be received to prove a sale to the defendant, contradicting the proof under plaintiff's handwriting of a sale to Shannon.

Second. That no averment was made of a sale to Shannon for the use, or on account of the defendant ; and that the defendant had consequently, no notice from the petition of any such claim. It does not appear to us that the Judge erred. On the merits, the defendant established her purchase of the furniture from Shannon, with the exception of a small article which she bought from the plaintiff, and for which she produced his receipt. It was admitted that the notes of Shannon for the furniture which he purchased, were given in payment as so much cash.

Judgment affirmed.

JOSEPH A. BEARD and another v. RICHARD K. CALL.

Action by plaintiffs for a balance due them as agents of defendant, for disbursements made for the use of a steamer, alleged to belong to the latter. Answer by defendant, denying the disbursements, and alleging that the boat was owned by plaintiffs and himself in partnership. A jury having found that a partnership existed, plaintiffs, in a supplemental petition, asked to change their original prayer into one for an account and settlement of all the affairs of the partnership, and for a judgment for the balance due them. *Held*, that the supplemental petition should have been rejected, as altering the nature of the original demand. C. P. 419.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MARTIN J. The defendant seeks the reversal of the judgment appealed from, on the ground that the Judge refused to dismiss the suit on the finding of the jury that there was a partnership between the parties, and ordered an account to be taken, in which, items were improperly allowed, notwithstanding his objections. The petitioners claim the balance of an account for disbursements made and commissions due them as agents of the defendant, and

consignees of his steam-boat, the *New Castle*. The answer after pleading the general issue, avers that the plaintiffs having purchased the steam-boat *New Castle*, the defendant became interested therein for two-thirds, and that it was agreed that she should be navigated for the benefit of both parties, and that if the plaintiffs have really made the disbursements, and earned the commissions charged in their account, which is denied, they have no claim on him, except for the balance of a general account of the affairs of the partnership. In a supplemental answer, the defendant stated himself to be the owner of a bill of exchange, accepted by the plaintiffs, and protested for non-payment, and pleaded its amount in reconvention and in compensation. The case was submitted to a jury, who found that there existed a partnership in the boat between the parties. The plaintiffs then filed a supplemental petition, asking that the prayer of the original petition might be changed into one for an account and settlement of all the affairs relating to the boat; and that a proper balance being determined in their favor, they may have judgment therefor. The defendant excepted to this petition. The exception was over-ruled; the court proceeded to try the case; and judgment was finally given against the defendant. It appears to us that the First Judge erred. He informs us that "it is common in chancery, for a suit brought with one intent, to be changed into a suit for another purpose, after evidence given. If, after evidence, it should appear the suit ought to be brought at law, the bill would of course be dismissed; but if it should appear that chancery was the proper court, although the claim is of a different nature, the court would allow a supplemental petition to be filed to meet the case." Our courts do not proceed according to the chancery practice, especially when it is opposed to the textual provisions of our statute, which forbid a plaintiff, when he has brought a suit with one intent, to change it into one for another purpose, after or before evidence given. Our Code of Practice, art. 419, provides that, "after issue joined the plaintiff may, with the leave of the court, amend his original petition, provided the amendment does not alter the substance of his demand, by making it different from the one originally brought;" 4 Mart. N. S. 137; 10 La. 424. Objections were made

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to the change of the action, on the ground that the defendant was entitled to a judgment which would enable him to recover damages from the plaintiffs, and their sureties, on the attachment bond for the wrongful seizure of his property, and to protect the sureties he had given for its release. The objections appear to us too serious to have been disposed of on the ground, that they could be examined in suits on the bond.

It is therefore ordered that the judgment be annulled, and reversed, and that there be judgment for the defendant as in case of nonsuit; the plaintiffs and appellees to pay the costs in both courts.

L. C. Duncan, for the plaintiffs.

P. Anderson, for the appellant.

ODILLE D. ROST v. STEPHEN HENDERSON and others.

No right of action can accrue from a verbal disposition *mortis causa*. C. C. 1563, 1569.

The exceptions made by arts. 241, 245, and 246 of the third title of the third book of the Code of 1808, to the rule laid down in art. 243 of the same title and book, as to the proof of contracts which may be appraised in money, exceeding five hundred dollars in value, are virtually repealed by the Civil Code of 1825. C. C. 2257.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

SIMON, J. This appeal is taken from a judgment which refuses to allow to the plaintiff the sum of sixty thousand dollars, by her claimed of the heirs of the late Stephen Henderson, as being the amount of a verbal disposition *causa mortis*, or request *in extremis*, made and expressed by Mrs. Zelia Elenore Henderson, in the city of New York, a few days and immediately before her death, and which, it is alleged, her surviving husband consented to comply with, and promised to pay, thereby contracting the civil obligation towards the plaintiff, to pay her a sum of money which originally he was only naturally and morally bound for, under the verbal disposition or request of his late wife.

The facts established by the record are these: On the 19th of June, 1827, Mrs. Henderson made her olographic will, in which she instituted her husband, Stephen Henderson, her sole and only testamentary executor and heir to all and every part of her estate. The will was written by her in the English language, although her maternal language was French. Sometime in August, 1830, she went to New York: but, according to the testimony of a respectable witness, intimate with the family, Mrs. Henderson did not show to her husband, before her departure, the same friendship that she had before, and the witness explains, that "it was during the whole year preceding Mrs. Henderson's departure to the north, that he, witness, noticed the alienation of her sentiments before spoken of." The friendship between Mrs. Henderson and the plaintiff was very great, and mutual; they were sisters, and the deceased had no children.

Mrs. Henderson arrived in New York on the 17th of August, 1830, and was placed by her husband under the charge of Robert Dyson, one of his friends, who had been written to to that effect, and took her lodgings at the American Hotel, where she died on the 19th of September following. During her last illness, Mr. Dyson used to see her very often, at least twice every day from the time of her arrival to the day of her death, and he had always an opportunity of conversing with her fully and freely at every daily visit. She conversed with him freely and confidentially on her private affairs. She frequently spoke of her sister, and manifested the strongest affection for her. She also frequently spoke of a will she had made in favor of her husband; she said that she wished to annul it, in order that she might make another leaving her entire property to her sister. Dyson called, on two several occasions, on Mr. E. Livingston, who was then in New York, to get him to wait on Mrs. Henderson for the purpose of drawing up her new will. Appointments were accordingly made, but she deferred them, as she was too much indisposed to bear the fatigue of proceeding to the business. She afterwards deferred it, from time to time, under the expectation of feeling stronger, but never was well enough to proceed with the preparation of a new will. Under these circumstances, she stated to the witness, *that she gave then to her sister the sum of \$60,000; that she wished her*

verbal statement to that effect to be taken for and considered as a part of her will; that she wished her said will to be considered as modified in that respect, so that her sister should receive the sum of \$60,000; and she then, *in the most solemn and impressive manner, called on Mr. Dyson to promise, on behalf of Mr. Henderson, that the said sum should be paid over by him, after her death, to her said sister.* She made this request of the witness several times, and repeated it the evening previous to her death. This disposition was explicitly and repeatedly declared by her to the witness, to be a modification and condition of her said will in favor of her husband; and the witness adds that he promised, that so far as was in his power, her request should be complied with, and he assured her that Mr. Henderson would perform it.

Stephen Henderson came to New York after his wife's death, and, on being apprised by Mr. Dyson of the dying request and last disposition of the deceased, replied, that *he would comply with and carry out the wishes of his deceased wife in that respect; that he would pay over to the plaintiff the sum of \$60,000; that he considered it legally and morally binding upon him to do so; and that it should be complied with to the very letter.* He even went so far as to say, that he intended that the plaintiff and her daughter should receive the whole of Mrs. Henderson's property and more, and that he would not dispose of one cent of it in any other way.

The witness further testifies that he saw Mr. Henderson in New York again in 1833, and asked him if he had complied with his wife's wishes and request, as regarded her bequest and legacy to the plaintiff. He replied that *he had done so to the very letter; and made a statement, that he had made an arrangement for the payment to said plaintiff of the sum of \$60,000 at a future time.*

No communication was ever made to the plaintiff or her husband by the witness, in relation to this matter, until the summer of 1838, when the witness accidentally learned that the plaintiff was not named in Mr. Henderson's will, and had received nothing from him. No one was present at any of the repeated conversations which were had between Mr. Dyson and Mrs. Henderson; nor was any person present, or within hearing, when Stephen

Henderson and the witness conversed in relation to the subject under consideration.

The record contains also the testimony of Grimshaw, who says, that he was in New York during the last sickness of Mrs. Henderson; that she was anxious to have the professional services of Mr. Livingston, for the purpose of making some testamentary dispositions; that she expressed her disposition to have a former will annulled or changed; that the disposition by her expressed in witness' presence was to have a new will made; and that her intention was to leave her property to her brothers and sisters in common.

The evidence also shows that Mrs. Henderson received from her father's estate about \$112,000; that her husband, as universal legatee of his wife, took possession of the whole of her estate under the will; and that the amount of the inventory of her estate was upwards of *fourteen hundred thousand dollars*. The plaintiff is not named in his will, except in relation to a few small legacies.

It is perfectly clear that under our laws, and our system of jurisprudence, no right of action would accrue from a verbal disposition *mortis causa*. Art. 1563 of the Civil Code says, positively, that no disposition *mortis causa* shall be made otherwise than by last will or testament; and, under the provisions contained in the 1569th article, that "the custom of making verbal testaments, that is to say, resulting from the mere deposition of witnesses, who were present when the testator made known to them his will, without his having committed it or caused it to be committed to writing, is abrogated," it cannot be contested that such verbal dispositions can have no legal effect. In the case of *Barrière v. Gladding's Executor*, 17 La. 147, we held that the amount of a note, subscribed by the deceased, and shown to have been executed as a mere disposition *mortis causa*, cannot be recovered; *a fortiori*, should the rule apply to the verbal expression of what the testator wishes to be done after his death.

But it has been strenuously contended, that this action is not based upon the verbal disposition of the deceased Mrs. Henderson, but upon the subsequent promise on the part of the heir to pay the amount of the verbal legacy; that although the verbal

disposition is stated in the petition to have been the origin of the obligation, the right of action here exercised results only from the contract made and entered into by Henderson, after the death of his wife, to comply with her wishes, and to pay to the plaintiff the sum bequeathed to her verbally by the deceased. This has been urged with a great deal of force and ability by the plaintiff's counsel, whose principal position was, in the argument of this cause, that the obligation imposed upon the heir by the testatrix, being only a moral and a natural one in its origin, became subsequently legal and binding upon him, by his positive promise to execute it.

It cannot, in our opinion, be controverted, that the obligation contracted by Henderson, after the death of his wife, was, in its origin, a *natural one*, within the definitions contained in the *first* and *fourth paragraphs* of the 1751st article of our Civil Code, which says: 1st. "Natural obligations are such as the law has rendered invalid *for the want of certain forms*, or for some reason of general policy, but *which are not in themselves immoral or unjust*;" and 4th. "There is also a natural obligation on those who inherit an estate, either under a will or by legal inheritance, *to execute the donations or other dispositions* which the former owner had made, but which are defective *for want of form only*." Now, from several very respectable and distinguished authorities, which we have had occasion to examine upon this subject, and among them Toullier, vol. 6, No. 390, who says: "*La question se réduit à savoir si une obligation naturelle qu'on veut éteindre peut être la cause d'une nouvelle obligation civile qu'on veut lui substituer. Or, où pourrait être la raison d'en douter?*" and who refers to a decision of the court of cassation, which establishes as a principle "*qu'une cause naturelle est suffisante pour la validité des actes*;" we are not prepared to say, that the present action should be denied to the plaintiff, as arising from the subsequent promise or obligation contracted towards her by Henderson, and that, viewed in this light, she should not be entitled to recover. Indeed, the weight of the authorities appears to be on her side of the question, and her action would perhaps be successful, (Sirey, an. 1811, p. 323. Ib. an. 1827, part 1, p. 139,) if, in the words of Toullier, Vol. 6, No. 187, "*la preuve de l'obligation est faite de la manière reçue par le droit civil*." The question then occurs in

this case, has the obligation alleged to have been contracted by Stephen Henderson, been legally, and sufficiently established? If not, this is an insuperable barrier to the plaintiff's right of recovery, however satisfactory the evidence may have been with regard to the existence of the verbal disposition.

The promise alleged to have been made by the deceased's husband, after her death, is only proven by *one witness*, by Mr. Dyson, who states it in his testimony, as fully and as positively as it is possible to be. The facts, however, are not supported by any corroborating circumstances, and under art. 2257, of the Civil Code, all agreements relative to personal property, and *all contracts for the payment of money*, where the value exceeds five hundred dollars, which are not reduced to writing, must be proved at least by one credible witness, and other corroborating circumstances. It has been ingeniously argued, that this article does not exclude the idea of one witness being sufficient, when according to arts. 243, 244, 245, 246, page 310, of the Civil Code of 1808, the case comes within one of the exceptions therein pointed out, and particularly when the creditor has been unable to procure a literal proof of the obligation. We cannot adhere to such a proposition. Corroborating circumstances are now required in all cases; and as this court said in a case reported 5 La. 268, the exceptions made in the Code of 1808, by which contracts above five hundred dollars, might be proved by a single credible witness, not having been introduced into the present Code, are virtually repealed; and the testimony of one witness alone does not suffice to establish such contracts, without proof of corroborating circumstances. In vain has it been insisted, that the fact of the verbal legacy has been shown by the testimony of Mr. Dyson, and other circumstances going to corroborate it. This is clearly insufficient, as the action being founded upon a subsequent verbal promise to execute the disposition, and to pay the amount of the legacy, it is obvious, that this new obligation cannot be enforced, unless it is proven according to law. This, in our opinion, the plaintiff has failed to do.

We think the inferior Judge has come to a correct conclusion on the insufficiency of the evidence; but his judgment should only have been one of nonsuit.

It is therefore ordered and decreed, that the judgment of the Parish Court be affirmed so as to have only the effect of a non-suit, with costs in the lower court, those in this court to be borne by the appellees.

Eustis, for the appellant.

E. Briggs, F. Grima, Roselius and Grymes, for the defendants.*

**Eustis*, for a re-hearing. This action is founded on the facts disclosed in the testimony of Mr. Dyson—the strong wish of Mrs. Henderson in her last illness to alter the will which she had made in New Orleans; her repeated declarations of such a wish; the circumstances under which her last request was made, and her will left unchanged; her dying request, that her sister should receive from her estate the sum of \$60,000; her insisting on her husband's agent promising in the most solemn manner, that this last injunction should be complied with by her husband; the assurance of the agent that this promise should be sacredly observed; her death under the conviction produced by this assurance; the communication of these facts to Mr. Henderson; his implied ratification of all that Dyson had done, and his taking the estate of his wife under her will, as her sole and universal heir:—these facts taken together created on the part of Mr. Henderson an obligation to pay to his wife's sister the amount, which affection in its last moments had devoted to her benefit; and if there be in the whole catalogue of human obligations one which the eye of justice ought to rest on with favor, it is surely this. A breach of it, not only wrongs the living, but defrauds the dead.

This statement does not contain the whole strength of our case. Far from it. But it is proposed, first, to consider the questions growing out of that state of facts alone.

I. The law immediately applicable to the case, as to the binding force and effect of a request and promise like those in evidence is well settled. If promises like this were not binding, the party would be enabled to accomplish a fraud, which the law in every case will hold itself competent to reach, and to prevent its effects. The testator is induced to maintain his testament on a promise, that certain wishes which are dear to him shall be complied with, provisions for an old and faithful servant, a friend, a relative, and dies under the conviction, that his wishes will be fulfilled. Shall the heir take the whole estate, and exempt himself from these charges, and thus thwart the intentions of his benefactor?

The law on the contrary will compel the heir to be just, and prevent him from accomplishing what would be considered by all laws as a fraud. Powell on Devises, 696, *et seq.*, contains several cases in which this principle is carried out.

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"If a man, having made his will, and his son executor, had said when he was dying, that he had a mind to have his wife executrix, and the son had said: Don't trouble yourself to alter the will, for I will let her have the surplus, and act as executrix, the Court of Chancery would decree it accordingly." The ground on which the learned author states that these requests are enforced, is not that of a trust, but of a fraud.

In the Supreme Court of Pennsylvania, the subject has received a very thorough investigation. It was there determined, that if a testator make a devise, under a promise on the part of a devisee, that it should be applied to the benefit of another, a trust is thereby created which may be established by parol, and this is not contrary to the statute of wills. *Hoge v. Hoge*, 1 Watts, 215.

The English cases are carefully reviewed and confirmed, in the opinion given by the Chief Justice, and some of them are so similar to this case, that it is thought worth while to cite them.

Harris v. Howell, Gilbert's Eq. Rep. 11. "A testator who had devised all his land to his nephew, desired his heir at law not to disturb him in the possession of certain after purchased lands, and it was so held."

Chamberlaine v. Chamberlaine, 2 Freeman, 34. This is very strong in support of the principle. "A testator having settled lands on his son for life, and having discourse about altering his will for fear there should not be enough to pay certain legacies to his daughter, was told by his son, that he would pay them if the assets were deficient, and it was held, that having suffered his father to die in peace, on a promise which had prevented him from altering his will, he should pay them himself; the Chancellor remarking that it was the constant practice of the court to make decrees on such promises."

Oldhouse v. Litchfield, 2 Vernon, 506. "Lands were charged with an annuity, on proof that the testator was prevented from charging them in his will by a promise of payment by the devisee."

Thynn v. Thynn, 1 Vernon, 296. "A son induced his mother, by promising to be a trustee for her use, to prevail on her husband to make a new will, and appoint him executor in her stead, and he was so decreed."

Reach v. Kennegal, 1 Vesey, 122. An executor and residuary legatee promised to pay a legacy not in the will, and was decreed to pay it out of the assets. Lord Hardwicke, in that case admits, that the rule of law and of the court, strengthened by the statute, is, that all legacies must be written in the will, and that all the arguments against breaking in upon wills by parol proof were well founded. But, notwithstanding, that the court had adhered to the principle, wherever a case is infected with fraud, the court will not suffer the statute to protect it so that any one shall run away with a benefit not intended.

In the Pennsylvania case, *Hoge v. Hoge*, the Chief Justice lays down as a rule, that a participation in the benefits of a fraud, having knowledge of its existence, or leaving the means of knowledge unimproved, would implicate the party as a confederate, and whether as an active or passive one would be immaterial to the question. 1 Maddock's Chancery, 266. Hovenden, an author

who treats on the remedial jurisdiction of the Court of Chancery in matters of fraud, lays down the rule as established by uniform decisions of that court. "Should an heir or personal representative, whose interests would be affected by the regular insertion of a bequest in a will, induce the testator to omit making a formal provision for an intended object of his bounty, by assurances that the testator's wishes should be as fully executed as if the bequest were formally made, this promise and undertaking will raise a trust, which, though not available at common law, will be enforced in equity on the ground of fraud; and such an engagement may be entered into not only by words, but by silent assent to such a proposed undertaking." 2 Vesey & Beames, 262. 11 Vesey, 638. 9 Id. 519. 3 Id. 154. 2 Freeman, 34 and 285. 4 Vesey, 10. 13 Vesey, 475. These rules which have been found necessary, in the practical jurisprudence of England for the prevention of fraud, are they or not in accordance with the principles of our own laws? Before this question is examined one or two matters must not be overlooked.

The statutes in England and in Pennsylvania, requiring all devises of land and tenements to be in writing, to be signed by the testator, and subscribed by witnesses, and the laws concerning the admissibility of parol evidence, are as rigorous as any of the provisions of our laws on the subject of testaments. 2 Black. Com. 376.

It is true, that in the English law verbal legacies, if made under certain circumstances, and proved in a certain way, may be valid. But in all the cases cited the verbal request has been enforced, not on the ground of its being valid, as a naked testamentary disposition complete in point of form, but as a condition, intended for the benefit of another, with which the devise stands charged, and which justice requires should be enforced, notwithstanding the defective form in which it appears. Civil Code, art. 1569.

It is true, that the usage of making verbal wills, formerly existing in this country, is abolished; but by our laws the vice of fraud destroys the validity of all obligations, of all acts which it infects; and a testamentary disposition, made like this universal institution in favor of the husband, lacks one essential requisite of a will, the intention of the testatrix. It would be going too far to say, that *courts of justice* would not provide relief in cases of this kind. There may be difficulties in getting at the facts; there may be technical rules which exclude evidence of a particular kind; but wherever the facts of a case like this are before a court, with sufficient legal evidence of them to satisfy beyond a reasonable doubt the judges of their existence, it seems to be scarcely reasonable to suppose, that the court can withhold the exercise of its powers in carrying out the will of the testator, and of preventing the recipient of the favor from setting at naught the very condition on which it was bestowed.

It is undoubtedly the duty of the court to carry into effect the provisions of our code in relation to the form of testaments; but is it not equally incumbent on it to prevent fraud and deception from receiving the fruits of their works? Are not good faith, truth, and equity as imperative in our laws, as the regula-

tions concerning the form of wills. *Æquitas in omnibus, maxime in jure spectanda est.* This is an axiom, a leading principle of the civil law, a system which has governed nearly the whole of christendom for ages, from the fact alone of its conformity to the eternal principles of justice.

Here we find the equitable provisions of our code concerning *quasi contracts*.

The lawful and voluntary acts of man, from which an obligation results, are as binding as any express and formal contract. Civil Code, arts. 2272, 2273, 2293.

These obligations have their foundation in the power of the law: *legis virtus est, imperare, velare, permittere, punire.* This law is but an exponent of the principle. "*Jure naturæ æquum est neminem cum alterius detrimento fieri locupletiores.*"

"*Vous êtes-vous enrichi, avez-vous profité par votre fait, ou, par celui d'un tiers, aux dépens d'une autre personne sans que celle-ci ait eu la volonté de vous gratifier? Vous êtes engagé, vous êtes obligé, et, si vous l'êtes, il y a droit acquis à celui aux dépens de qui vous vous êtes enrichi. Plus de difficultés sur le point de l'engagement ou de l'obligation.*" 11 Toullier, No. 20. On this subject great controversies have been entertained among the learned. They are reviewed by Toullier, who states the rule with his usual comprehensiveness and precision. Vide also Merlin, Rep. de Jurisprudence, verbo, *quasi contract*.

There is no word in the English law which strictly corresponds with the word *quasi contract*; but the class of cases is provided with remedies as efficient as under our laws. The courts of equity prevent frauds from being accomplished, and courts of law imply an assumption or promise whenever good faith and honesty require it to be made, which will give parties full relief in all cases of quasi contracts.

The question concerning the *admissibility of parol evidence* to establish the facts which occurred at the bed-side of the deceased, and her declarations, cannot be raised, for no objection was made to the admissibility of parol evidence at the trial. No bill of exceptions was taken. The evidence is before the court, and the case must stand or fall by the weight of it. If parol evidence in regard to immoveable property be admitted without objection in the inferior court, it cannot be objected to on the appeal. *Babineau v. Cormier*, 1 Mart. N. S. 456. Our own code provides by an express article, (1842,) for the mode in which fraud must be proved; that is, it provides, that it may be proved by any means which can be reasonably pre-supposed. It may be proved by *simple presumptions, by legal presumptions, and by other evidence.* The maxim, that fraud is not to be presumed, means no more than that it is not to be imputed without legal evidence.

To provide by law, that fraud should only be proved in a certain way, would be to establish, that it should not be proved at all.

It is sometimes supposed that there is something peculiar to the chancery system of England, which renders it inapplicable under our jurisprudence.

That the machinery by which a court of equity operates, is different from that by which our laws are administered, may be true, though the great difference is not so material as often imagined; but the principles upon which the two systems rest are identical. The equity system is professedly based upon the same laws as our own. The writings of Civilians are guides for the Chancellors, in all matters not purely arbitrary.

The Prætors of Rome held the first courts of equity of which we have any account. Their province was *juvare*, supplere, *interpretare*, mittigare, *jus civile non mutare vel tollere*. Dig. lib. 1. tit. 1. 7. Co. Litt. 24. b. In the writers of the civil law much matter may be found concerning legacies and testaments; and the principles before stated, although perhaps not acknowledged in so many words, are nevertheless recognized in reality and in practical application. 1 Poujol on Test. Don. 134, 178. 2 Id. 353. 1 Guilhou on Donations, No. 221.

Article 1479, of our code, purports to have extinguished many of the causes for which it is assumed that testaments might have been annulled under the civil law. Without this article, the motives of hatred and anger, or the facts of suggestion, or captation, would not be held sufficient in the present state of opinion to invalidate a will. The article quoted was proposed in the *projet* of the Napoleon code, and after deliberation rejected by the Council of State; but even in France, no testamentary disposition could be avoided unless the facts alleged in avoidance of it amounted to what is technically considered as *fraud* in equity. 5 Toullier, 663, No. 714. Comdeliste, *Traité de Donations*, p. 84, § 16.

Quant à la suggestion et à la captation elles sont encore chez nous une cause de nullité; mais seulement quand le dol et les menées artificielles s'y réunissent, (Furgole, *Testam. ch. 5. § 3. No. 26 a 47. Grenier, No. 143. Merlin. Rep. Verbo Suggestion*) *parce que, sans ces fraudes, le testateur aurait autrement disposé, ou laissé régler sa succession par la loi commune.*

Suggestion and captation from a third person for the benefit of a legatee is sufficient. 26 Sirey, 1st part, page 10. *Celui qui se croit l'objet d'un legs secret, peut le prouver.* 23 Sirey, 2d part, page 78. It would not be reasonable to suppose that article 1479 was intended to reach cases of fraud—that in other words it was intended to give validity to testamentary dispositions which should have any of the radical vices of error, fraud, or violence, which in law invalidate all obligations, all donations, all acts.

The explanation of the article is very obvious. Many of the old writers on donations maintained, that simple suggestion was a cause of nullity of testamentary dispositions. This idea was founded on a text of the Roman Law, Dig. lib. 11, tit. 2, *De servo corrupto*.

The error of this doctrine is shown by Furgole, *loco citato*, and Merlin, *loc. cit.* adopts his conclusions. A sound interpretation will confine the operation of the article to the objects mentioned, and consider it as declaratory of the law and as fixing its doctrine, and not as creating an innovation in jurispru-

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dence. No evidence can, or ought to be received, of simple suggestion or captation, or of anger, hatred, caprice of temper, or any infirmity, unless it should affect the reason in the one case so as to render the will uncertain, and in the other, unless the suggestion or captation should amount to fraud.

The evidence of the suggestion and captation, which prevented the testatrix from changing her will, was admitted without opposition, and must have its legal effect. Art. 1479. provides that *proof is not admitted* of testamentary dispositions having been made through suggestion or captation, but parties may waive the right they have to object to such evidence. Civil Code, art. 1767. Thus although art. 2415 has provided in the same words that all verbal sales of immovables shall be null, as well for third persons, as for the contracting parties, and that testimonial proof of them shall not be admitted, the Supreme Court have decided that parol evidence, if not objected to, is valid to prove those sales. *Strawbridge v. Warfield*, 4 La. 22. The allegations of suggestion and fraud are sufficiently explicit in the pleadings, and are proved by evidence to the introduction of which no objection was made. It does not matter whether a fact is put at issue, provided it is established by evidence. *McMicken v. Brown*, 6 Mart. N. S. 85. If a party mistake his rights in the pleadings, but proves them by evidence not objected to, the defect is cured. *Bryan and wife v. Morris*, 11 Mart. 26. *Canfield and others v. McLaughlin*, 9 Mart. 326. *Flogny v. Adams*, 11 Mart. 547.

II. But did Henderson himself make a promise to the deceased, to pay the plaintiff any sum of money? There is no evidence that he did; but Dyson made the promise for him. "She then in the most solemn and impressive manner called on me to promise on behalf of Mr. Henderson, her late husband, that the said sum of sixty thousand dollars should be paid over by him after her death to her said sister. She made the request of me several times during the few days preceding her death, and repeated it, I think, the evening previous to her death. I promised her that so far as it was in my power her request should be complied with, and assured her that Mr. Henderson would perform this her last request."

What authority had Dyson to promise for Henderson? No express authority. The only right he had to open his lips on the subject grew out of his relations with Henderson which his testimony will explain.

Dyson became acquainted with Henderson in 1816, in New Orleans. He resided here for several years, and while here saw Henderson very frequently and intimately, and was on the most friendly and confidential footing with him. He transacted his business in New York from 1831 until his death. Henderson went to New York frequently during that period, and when there was familiarly at Dyson's house, advised with him confidentially as to his business affairs, his personal affairs, and his family affairs.

Dyson of course was acquainted with Mrs. Henderson, and under his charge during her last illness was she placed by her husband. Her reason was unclouded up to the time of her death, and every fact stated by Dyson in relation

to the matter in controversy is precisely that which would have occurred under similar circumstances.

Dyson's testimony is uncontradicted in every particular. It is based upon written memorandums made at the time. He refers to his letter book of Aug. 17th, 1830, to a letter to Mr. Henderson, announcing the arrival of his wife.

Mrs. Henderson died on the 19th of Sept. Dyson says in answer to a cross interrogatory, "I find on referring to my letter book that in a letter which I wrote to Mr. Henderson on the 22d of Sept., 1830, being three days after the death of Mrs. Henderson, I wrote to him in reference to Mrs. Henderson's wishes and donations (of which I have before given the details in my answers to the interrogatories,) in these words, "I have something to communicate touching the desire of Mrs. Henderson, which I shall withhold until *I see or hear from you*." If there was anything in the testimony of this witness which was not strictly true, it could easily have been impugned. The parties defendant could have called for his book, or had it examined by a disinterested person. The testimony was on file for months before the trial. The executors having the papers of the deceased, and the heirs, having access to them at all times, could have disproved by Dyson's own letters (which they must be supposed, in the absence of any proof to the contrary, to have,) any *fact of agency* if it did not exist, which Dyson's testimony tends to establish.

His agency, his intimacy with Henderson, and the confidence reposed in him by Henderson, are proved by the fact of his wife being committed to his charge. To whom but a person enjoying in the highest degree the friendship and confidence of the husband, could a lady be committed, in her last illness, in a strange place?

Grimshaw's testimony as to the desire of Mrs. H. to change her New Orleans will, and as to Dyson's intimacy, and his being what he represents himself to be in relation to the parties, coupled with what has been before recited, renders the testimony of Dyson impregnable, and amounting to full proof in any court of justice.

Mr. Henderson went to New York after the death of his wife, and returned bringing with him, as Dyson believes, the mulatto servant of his deceased wife, who was the only person present at the scene in the bed chamber of the deceased, to which Dyson attests.

Dyson saw Mr. Henderson a few hours after his arrival in New York, and communicated to him the request and injunction of his deceased wife in favor of her sister, and his own promise in relation to it. Mr. Henderson then promised to *comply with it to the very letter*, and considered himself morally and legally bound so to do. Words cannot be more formal and positive than those used by him on the occasion. These are all the facts which it is now material to consider in this part of the argument.

If the promise be considered as having been made by Henderson himself, can there be a doubt of the plaintiff's right to take advantage of it? Is not the

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consideration sufficient? Is not the injunction to carry into effect what was literally the last wish of his wife, creative of an obligation of a most sacred character on his part? The promise was made to the deceased by Dyson, but ratified and confirmed by Henderson, on receiving the consideration.

This is an equitable action which our code recognizes, Code of Practice, art 35. The action arises from equity, in favor of a third person not a party to the contract. Thus if one stipulates in a contract with another, that this person shall pay a certain sum of money or give a certain thing to a third person, this gives an action to the third person to enforce the execution of the stipulation. Civil Code, art. 1884. Code of 1808, 262. 2 Martin, N. S. 672, *Duchamp v. Nicholson*. Equity will never permit a party to enjoy a benefit, without complying with the conditions imposed with it. Hovenden, 274.

There is a further corroboration of this promise, on the part of Henderson. In the summer of 1833, he again went to New York. His friend Dyson of course, asked him if he had complied with the request of his late wife in favor of her sister. Henderson replied, "that he had done so to the very letter." He stated "that he had made an arrangement for the payment to the plaintiff of the sum of *sixty thousand dollars, at a future time.*" Dyson adds, "I do not think he specified the time when he was to pay it."

It is obvious, that Henderson never pretended in his lifetime that he paid the plaintiff this amount. In this conversation it is clear, taking the whole together, that he considered the *arrangement* to pay the amount at a future time, as a compliance with the promise made by Dyson and himself. Will not this arrangement support an action for the amount? What is it but an acknowledgment of the obligation, and a promise to pay the amount due. Had the money ever been paid, or the obligation satisfied, the fact would have appeared by the papers of the late Mr. Henderson, and would have been pleaded formally, as it ought to have been.

As the matter now stands on the evidence, the obligation is unperformed on the part of Henderson or the defendants.

III. Did the promise of Henderson—that is of Dyson—produce such an effect on the mind of the testator as to render it obligatory?

That Mrs. Henderson wished to alter her will while she was ill in New York, is proved beyond contestation by the testimony of Grimshaw in corroboration of that of Dyson, and is rendered probable by the testimony of Le Breton, another witness.

Did she not die in peace, under the promise of Dyson, which prevented her from altering her New Orleans will? *Chamberlayne's case*, 2 Freeman, 34. She desired to alter her will. She told Grimshaw that she desired to benefit her brothers and sisters. Probably she did at that time; but the project of the will appears to have been given up on the assurance of Dyson of a compliance with the request, upon which she finally settled, in favor of her sister alone.

Let us suppose, that instead of promising as he did on behalf of Mr. Henderson, he had candidly told her that he could make no promise for himself or Henderson, who can say that she would not have altered her will?

It is in vain to say, that there was no time to accomplish this. No one can tell the effect of such a declaration on the mind of the deceased. The body and the intellect might have been roused to new action; an effort might have been made; new counsel might have been had; and her last wishes might have been put in a form which would have ensured their execution.

The future actions of persons laboring under disease are always uncertain, and subject entirely to conjecture. The test of the validity of obligations of this kind is this. Did, or did not the deceased die under the firm belief that her wishes and requests would be realized, and was this belief produced by the words or acts of those who are to benefit by the non-compliance of such request. That the deceased died under this conviction is undisputable, and that it was the result of the promise of Dyson is equally so. The distinction between inducing a person to make a new will, or not to alter an old one, cannot be maintained. The result of both acts is the same—a defeat of the intention of the testator. If the trust placed in Mr. Henderson by the testatrix is a *fidei-commissum*, it is one expressly authorized by law. Mr. Henderson was his wife's sole executor as well as her universal legatee; the payment of legacies of *sums of money* is a naked trust, which executors are required to perform; and to be enabled to do so, they are authorized to sell the property of the succession in default of money to a sufficient amount. Civil Code, art. 1661—1663. The rule laid down, *Mathurin v. Livaudais*, 5 Mart. N. S. 303, is undoubtedly the true one. All trusts which executors can legally perform, may be performed by other persons, and do not come within the prohibition of art. 1517 of the Civil Code.

IV. In relation to the evidence requisite to charge the defendants in this case, it is to be observed, that if the request and promise be repudiated as forming a legal obligation on the heir and universal legatee, it certainly amounts to a representation which, if not obligatory, ought not to have been made, and must be considered as deceptive.

Deception may be established by any species of proof, verbal, written, or circumstantial and presumptive; Civil Code, art. 2267. "*Selon les règles du droit, la fraude ne peut être prouvée que par conjectures, et ne serait pas fraude si elle n'était occulte.*" Coquillu, sur l'art., 40 du ch. 4, de la coutume de Nivernais.

Duranton, D'Aguesseau and Merlin unite in establishing the same rules. Rep. de Jurisp. de Merlin, *verbo*, Suggestion.

To prove a representation which would so operate under the circumstances as to deceive a person, the uncontradicted testimony of one witness is sufficient under our law.

Why not? What is there in the law requiring more? It is not an agreement creating an obligation. It is a fact, which, coupled with another, makes a

quasi contract; Civil Code, art. 2273. *All acts from which any obligation results to a third person, &c.*

Does the law require more than one witness to prove an act—a fact! Surely not. Cannot a fact be proved by presumption—by anything inducing a rational belief?

It is urged that the testimony of two witnesses, or of one witness and corroborating circumstances, are necessary to establish the agreement on which this action is founded; Civil Code, art. 2257.

In order to understand this article 2257, in its proper import and application, it is necessary to refer to our legislation on the subject. The article, it is believed, has never received any judicial interpretation. It is so important in its operation, being more often perhaps referred to on the trial of cases than any other arbitrary rule of evidence, that a full discussion of it will not be without its advantage.

By the Code of 1808, covenants or agreements, the objects of which could be appraised, in money, could be proved, if no writing were made of them, only by the oath of two competent and credible witnesses, in all cases exceeding \$500—under that sum the testimony of one witness was sufficient. Code of 1808, p. 310, art. 243. But in the former case, the testimony of one witness sufficed, if there existed a beginning of proof in writing, by which is meant any writing emanating from the party rendering the fact probable; art. 244.

There were several exceptions to the rule of art. 243. It did not apply to mercantile sales and transactions, nor the sale of crops and of produce; art. 245.

It did not apply to necessary deposits, and those made by travellers at an inn, according to the quality of persons, and the circumstances of the fact.

It did not apply to cases in which there was an impossibility of the creditor's procuring *literal proof* of the obligation, meaning proof in writing; art. 246.

It did not apply to obligations arising from *quasi-contracts*, offences or *quasi-offences*.

It did not apply to obligations contracted in case of unforeseen accident, where there was no possibility of making acts in writing; nor to cases in which the title was lost; art. 246; not to cases where only one witness could be had, without great difficulty. Febrero, L. 63, C. 1, No. 328, p. 326. Thus it will be seen that these numerous and comprehensive classes of cases were excepted from the operation of the art. 243. The art. 243 establishes a mere arbitrary rule directly in violation of the great principle, which since the abolition of torture and the machinery of judicial proofs, forms a part of every system of jurisprudence. "*Testimonia ponderantur, non numerantur.*"

It was necessary to exclude from its operation the great multitude of cases which occur in the ordinary affairs of men. This was done by means of sweeping exceptions. Article 243 is for all purposes of evil completely emasculated. It certainly was not wise in legislation to establish a general rule in a code and then destroy it by exceptions. Accordingly in our new code of 1825, the anomaly was remedied, and a more just rule was established which should be

general in its application, and the whole subject was merged in art. 2257, which rendered, in all cases of contract, the evidence of one witness and of corroborating circumstances sufficient to establish it; the concurrence of a credible witness, and of circumstances which rendered the facts testified to probable, being all that, in any case, ought in reason to be required. *Vide Projet of Civil Code.* The suppression of articles 243 *et seq.* of the code of 1808, and the enactment of art. 2257, of the present code in their stead, could in no sense be considered as a repeal of the exceptions they contained.

Could not an obligation resulting from a necessary deposit in case of fire, shipwreck, or other accident—from a quasi contract—be now proved by one witness and corroborating circumstances of quality, condition, pursuits, and habits of the party, as well as under the Code of 1808? There is no difference in the law under the two Codes as to the cases excepted.

As to the meaning of the terms *corroborating circumstances* one can scarcely be at a loss. They have no technical meaning, and it is believed they are not used in any part of our Code, except in the article under consideration (2257.) Anything relative to the subject of the deposition of the witness which renders it probable, may be considered as a corroborating circumstance. The circumstance must be a *fact* about which there can be no question, before it can be considered as forming a presumption, or corroborating circumstance of a fact in question.

Whether a fact creates a presumption, or is a corroborating circumstance, rests with the judgment of the judge or jury. It would be difficult to establish any general rule as to the effect of this, or of any other species of evidence. The end of evidence is to create belief. Belief is involuntary, and under no human control; and it is vain to attempt to limit, or control it by any rule.

Presumptive evidence is under this article admissible to corroborate direct testimony. The presumption results from circumstances. Any fact which affords presumption may be resorted to and received as evidence. On the subject of presumptions, not established by law, our Code has an express provision.

"Presumptions are left to the discretion of the judge, who ought to admit none but weighty, precise, and consistent presumptions, and only in cases where the law admits testimonial proof, unless the act be *attacked on account of fraud or deceit.*" Civil Code, art. 2267.

Is it not a reasonable conclusion from this article, that any facts which produce a strong presumption—one which is positive and definite, consistent with the deposition to be confirmed—those facts being consistent with all the other facts of the case and those sworn to, are proper evidence, and must be considered as corroborating circumstances?

Indeed what does the article require in order to render efficient the deposition of a single credible witness? Circumstantial evidence, and what is that but presumptive evidence which is any which is not *direct and positive*. The article can mean nothing else. It provides that the testimony of one witness shall not be sufficient to establish certain agreements or contracts, unless that

testimony be supported or rendered probable by circumstantial evidence, "*Testis unus, testis nullus*," unless facts afford a presumption of the truth of his declaration.

It may be conceded that the corroborating circumstances must be established otherwise than by the deposition of the witness.

Now it is evident that the facts in this case establish a chain of circumstantial evidence, the force of which is irresistible.

In the first place, the basis of facts is proved beyond all question. They all render the last request of the testatrix probable. Her large estate, her being on bad terms with her husband, her absence from him, her affection for her sister and her children, and all the other settled facts, coincide in tending to this result.

These coincidences of a moral kind are not the less effective on a rational and moral agent, than those which are exclusively material. If a party, as in this case, has in his power the means of disproving the evidence offered against him and neglects to do it, the omission affords a strong presumption of its truth, for it would be contrary to all reason and experience to form any other conclusion. Starkie, 488, 489.

The defendants have, or are supposed to have, the correspondence of Dyson in their possession. They could refute his deposition, if it were not true. They have the best means of bringing the truth to light. They do not use the very best evidence the case requires, but rely on mere matters of form to weaken it. This is a circumstance of great import in weighing the testimony. The possession of a document which would decide a disputed point, and the omission to produce it, is a strong presumption against the party having it. 4 Burrows, 2484. The requisites to give effect to circumstantial evidence are all found in this case: 1. Dependent as well as independent circumstances—all coincident and concurrent: 2. The absence of any testimony tending to a different conclusion: 3. Cumulative and concurrent probabilities: 4. All these excluding every other hypothesis, when the deposition is considered with them.

Dyson in his testimony swears positively to the truth of part of a letter addressed to Henderson, on receiving the dying injunction of his wife. He gives a sworn copy of his letter taken from his letter book. It is insisted that this fact—this letter—is an independent fact which must be considered as a corroborating circumstance, because the means of ascertaining its truth rest exclusively with the defendants.

It is obvious that this verbal declaration as to the contents of a written instrument would not have been admitted, except by consent, without a notice to produce the original; and, by waiving this right and admitting parol evidence of a document in their possession, do not the defendants in fact consent that the contents of the documents shall be ascertained by Dyson's testimony? Is not this an independent fact, of the truth of which the defendants alone hold the

test? The evidence being admitted without objection, can any valid argument be urged against its effect?

It is proved by two witnesses, (Dyson and Grimshaw,) that the testatrix desired to make a new will in New York, during her last illness; and that she sought the means of so doing. *This fact*, with its circumstances, corroborates, in the most conclusive manner, the deposition of Dyson.

What stronger circumstantial evidence can be required in order to corroborate his testimony, than the relations of friendship and business which existed between Henderson and Dyson? The former entrusted the latter with the charge and protection of his dying wife, and gave him, in the most unlimited degree, his confidence. There can be no question that their relations were of the most intimate and confidential character, and that the testatrix participated in them. The correspondence and the books of Henderson would have shown it, if this fact had been questionable. Is not this a circumstance independent of the testimony of the witness which fortifies it? Are all witnesses in the eye of the law equal? Are they mere material machines to be counted? Are opportunities, probabilities, all moral resources to be excluded from consideration? The law implies no such absurdity. It does not mean that one, two, or forty witnesses shall be believed. Belief is beyond all human control. The law requires the testimony of a witness to be corroborated by circumstances in a case like this, and what can give more weight to his declarations that the fact of his position with both parties, rendering it probable that he would be entrusted with a mission, for which it is established *aliunde*, that he had their mutual confidence.

The court, in their opinion, state that art. 2257 of the present Civil Code has repealed the exceptions to the rule of the code of 1808, that two witnesses were required to prove contracts above \$500 in value.

This is believed to be an error, and the court are respectfully requested to examine the question, without reference to the case of *Alison v. Cox*, where that opinion was first intimated.

The jurists, who prepared the amendments to the code, proposed in their *projet* to suppress the article requiring two witnesses, and all the exceptions to it, and to replace them all by art. 2257. This change was made. Viewed by itself it may receive two interpretations. It may be considered either as a repeal of all the exceptions, requiring after its adoption more evidence in the cases excepted than was required before; or, as an extension of the original rule, intended to continue and to embrace all those exceptions, by making the peculiar facts which had rendered them necessary under the former law, corroborating circumstances: so that, for instance, in a necessary deposit made in case of fire, or shipwreck, or by a traveller at an inn, in cases of *quasi-contracts*, and in those where written evidence could not be procured, the proof of those facts would be sufficient to corroborate the testimony of a credible witness.

A reference to the *projet* itself, however, and to the various reports made by its authors to the legislature and adopted, can leave no doubt as to the inter-

Rost v. Henderson and others.

pretation which they themselves gave to the amendment; and this we consider as the safe and only guide. They did not propose to repeal the exceptions, as they invariably did when a repeal was intended, but only to replace the exceptions and the rule by a new rule. The known tendency of their minds, their various communications to the different branches of government, and we may add the spirit of the age, repudiate the idea that they intended to encumber the law of wisdom with restrictions which did not before exist. They were of the school of Jeremy Bentham, and felt the force of the maxim, *testimonia ponderantur, non numerantur*. It may be said of them without disparagement, that if they had a fault it was the other way, and that in their anxiety to perfect our jurisprudence, and to shape it according to the rules of modern ethics, they introduced into it, a vast deal of doubt and uncertainty. This is a serious evil, but it shows that in all they did, their tendency was towards theoretical perfection, and that as, on the subject of evidence, their avowed object was to do away as much as possible with restrictions to the admissibility of witnesses, leaving any objection against them to go to their credibility, it cannot be supposed that they intended to increase those restrictions in any case, where a different interpretation flows naturally from the course they pursued, and is in accordance with their views.

It was never intended to repeal any of those exceptions. A beginning of proof in writing is now a corroborating circumstance. It was defined a paper emanating from the person to whom it was opposed, rendering the fact alleged probable. Art. 2257 is an extension of this rule. It provides that instead of a beginning of proof in writing, any circumstance rendering the fact probable shall be deemed sufficient. "*La déposition d'un témoin, accompagnée de circonstances qui la corroborent,*" can have no other meaning. Every circumstance of whatever kind, which renders the fact probable, corroborates the testimony of the witness.

The court consider that all the facts sworn to by Dyson, except the contract of Mr. H., as sufficiently proved. They entertain no doubt as to his veracity; and, therefore, they know as men, if not as judges, that Henderson did make such a promise, so that under the view they have taken, the technicalities of law stand alone in the way of justice. Under those circumstances, slight corroborating circumstances ought to suffice; and before making absolute a decree which may work an irreparable injury to the plaintiff, the court are earnestly requested to consider whether sufficient evidence has not been adduced in this case.

The fact of this claim being founded on a quasi-contract, is, as already stated, a corroborating circumstance; and the impossibility of procuring written evidence is another. Besides these, the relationship and intimacy of the parties, and the ancestor of the defendants receiving from his wife half a million, one-fifth of which would have come to the plaintiff by descent if the will had been destroyed, are circumstances which render the fact probable in a high degree.

Leave the evidence of Dyson at the point where the court says it ceases to

be conclusive. After he had informed Mr. Henderson of the last disposition of his wife, and of the promise he had made her, and requested him to comply with it, can any body doubt what his answer must have been, judging by the rules of justice and right as applicable to this case. Would not any one say that he must have agreed instantly to pay the legacy? The facts peculiar to the case which create that impression, apart from any direct evidence, are the strongest corroborating circumstances that can exist. The quality of the witness also is a material circumstance. By law, every person over fourteen years of age, of sound mind, free or enfranchised, and not infamous, is a competent witness; so that, however dishonest and corrupt a man may be, if he has escaped conviction in a case of felony, he is a competent witness. The testimony of such a witness is the lowest grade of evidence, and might be placed at the foot of the scale, when that of such a man as Dyson would stand at the head of it. The law, in speaking of a credible witness, has no reference to either of these extremes, but to the common standard equally removed from both. Below that standard the witness is often not credible; above it the circumstances of position, character, and knowledge, which increase his credibility, must be considered as corroborating his deposition. The court will perceive at once, that if any other person in New York certified to the same facts, his deposition would not create belief to the same extent as that of Mr. Dyson.—Why should not this be a corroborating circumstance? Again, Henderson told Dyson, in 1833, that he had complied with the request of his wife, and made with the plaintiff an arrangement by which he was to pay her at a future day. The same witness proves as conclusively as a negative can be proved, that the plaintiff was not aware of the disposition of her sister in her favor, until apprised of it by him in 1838, after the death of Henderson. This is explained by the fact that Henderson did make to the plaintiff, who accepted it, the promise mentioned to Dyson, but made it as coming from himself, and did not state to her the real consideration. Under art. 1868 and 1894 of the Civil Code, the contract was not the less valid, because a valuable consideration existed at the time, and the concealment was an artifice which kept the plaintiff in ignorance of her rights, till after the death of Henderson, and thus prevented her from procuring written evidence of the promise. Such an artifice is a fraud which one witness is competent to prove, and of which his heir cannot take advantage.

It appears to the plaintiff's counsel, that corroboratory circumstances are not limited by law to any particular class of facts, and especially not to those that occurred at the time of, or since the contract, and having a direct and necessary reference to it; but that, on the contrary, any circumstances whatever which, coupled with the deposition of one witness, leave no doubt upon the mind, are sufficient in law, as they are in reason:

That under a proper interpretation of art. 2257, quasi-contracts, and the attested impossibility of procuring written evidence, are each a sufficient corroborating circumstance:

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That if the court would ask themselves what corroborating circumstances would be admissible, under the rule they seem disposed to adopt, they will find that rule in most cases impracticable, and subversive, as it may be in this, of the great ends of justice.

Re-hearing refused.

DAVID OLIVIER and others v. PIERRE CLIDAMAND BECNEL.

APPEAL from the District Court of the First District, *Buchanan, J.*

Labauve, for the plaintiffs.

Grima and L. Junin, for the appellant.

MORPHY, J. This suit is brought to recover certain balances respectively due to the petitioners, on claims for which, it is alleged, that, in July, 1835, they granted to the defendant a respite of from one to six years, to be computed from the 20th of April, 1835; and they annex to their petition the notarial act showing the terms and conditions under which such respite was granted. They represent that the time then granted to the defendant, has expired since the 21st of April, 1841, and that during its continuance, they received in part payment certain sums, leaving the amounts claimed yet due to them, and for which they pray for judgment. The general issue was pleaded. There was a judgment below in favor of the plaintiffs, and the defendant has appealed.

In this court it was urged, on the part of the defendant, that pursuant to the terms of the respite he, sent each year his crop of sugar to an agent appointed by the petitioners to be sold; and that the petitioners are without any right of action against him, until they shall have rendered an account, showing the amount produced by the property. To this it would perhaps be sufficient to answer, that no such defence was pleaded below; but on examining the act of respite, we find in it a provision making it the duty of the agent selected by the creditors, to keep an exact account of the crops forwarded each year, and reserving to the de-

defendant the right of calling for, and receiving from the agent, a certified copy of the tableau of distribution of the funds realized by the sale of the crops. It is not shown or pretended, that the agent ever refused to render this annual account to the defendant. Nothing would have been easier than for the latter to have shown, if such had been the fact, that his creditors had received from the sale of his sugar, larger sums than they acknowledged to have received.

Judgment affirmed.

CHARLES MINOT v. THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES.

Proceedings under an order of seizure and sale, cannot be arrested by a rule to show cause. Art. 739, *et seq.*, of the Code of Practice, point out the mode in which opposition to executory process may be made by the defendant in it; and arts. 396, *et seq.*, of the same Code, and other laws, the means by which third persons may protect their rights.

APPEAL from the Commercial Court of New Orleans, *Watts, J. GARLAND, J.* The plaintiff having obtained several judgments in the State of Pennsylvania, against the defendants, presented them to the Judge of the Commercial Court, with a prayer, that he would grant him executory process, in conformity with the 2d clause of article 732, of the Code of Practice. The usual order was granted, and process issued; which was levied on certain rights and credits alleged to belong to the defendants, which, after a demand on, and notice to, the counsel appointed to represent the defendants, were advertised for sale. The attorney appointed to represent the defendants, then appeared in the court below, and stating the fact of the seizure and advertisement, moved that the plaintiff and Sheriff should show cause why they should not desist from further proceedings in the premises:

1st. Because the formalities and delays of the law in regard to

demand, notice of seizure and advertisement, had not been observed, and granted.

2d. Because the description of the property in the advertisement, was vague and insufficient.

3d. Because no part of the notes and obligations advertised, are in the possession of the Sheriff; and the notes of the Gas Bank pretended to be seized, are not within the jurisdiction of the court.

4th. Because previous to this seizure of the notes, they had been attached by the United States, in a suit against the defendants, in which suit certain persons had intervened and claimed them as their property, by virtue of an assignment, and certain receivers had been appointed by the court to collect the amount of said notes, who had the lawful custody, and charge of all of said property, with power to administer the same; and because the order of the court, in relation to the disposition of said notes and funds, would be entirely defeated and annulled, if the seizure was permitted to proceed; and because the whole proceeding was in disobedience of the order, and a contempt of the authority of the court.

5th. Because the affairs of the defendants are much embarrassed, and as the notes, rights, credits, and property are now in the hands of the receivers, the plaintiff ought to intervene in the case in which they were appointed, and receive a portion of the funds to be distributed.

To this rule the plaintiff answered, and showed for cause:

1st. That the defendants had no right, nor the court any power, to arrest the sale, unless in the manner prescribed by law, to wit, by an injunction.

2d. That no sufficient cause is stated to arrest the proceedings.

On hearing the parties, it appeared, that previous to the seizure under the plaintiff's execution, the United States had attached the same rights and credits; that the assignees of the Bank of the United States had intervened in the suit and claimed them; and that the Commercial Court had appointed Adams & Frazier, receivers of the funds, who had in their possession all the evidences of debt attached and seized, they having been delivered to them by the Sheriff, under the orders of the court.

The court ordered, that the Sheriff should desist from selling the rights, titles, and interest, in the advertisement recited, reserving the right to the plaintiff to intervene for his interest in the suit of *The United States v. The Bank of the United States*, and any rights he may have acquired by the seizure under the *fi. fa.*

It will be observed, that neither the receivers appointed by the court, the United States, nor the assignees of the Bank of the United States, are parties to this proceeding. It is the action of the Bank alone, or rather of the attorney appointed to represent it. He states, and proves the above facts, and calls upon us to arrest an execution against his principal, because it may prejudice the interests of other parties not before us. It is very clear, that the rights of those parties will not be, in any manner, affected by any decision, that may be made in this case. It would therefore be improper for us to express any opinion that should operate upon them. When they shall present themselves, it will be time enough to protect their interests.

As the case is now presented, we think the court erred in sustaining the rule, and in arresting the plaintiff and Sheriff in the course they were pursuing. The Code of Practice, arts. 739, 740, &c., indicates the mode in which oppositions to executory process may be made by the defendants in them. Arts. 395, 396, 397, 398, 399, of the same Code, and other laws, afford ample means to third persons, to protect their rights. In the present case, we think the defendants are not entitled to arrest the plaintiff's execution, without security and a regular injunction. The Judge therefore erred in making the rule absolute.

The judgment of the Commercial Court is, therefore, annulled and reversed, and it is ordered, that the rule taken upon the plaintiff be discharged, with costs in both courts.

F. Wharton and P. Anderson, for the appellant.

T. Slidell and Grymes, for the defendants.

The Merchants Bank of Baltimore v. The Bank of the United States.

THE MERCHANTS BANK OF BALTIMORE v. THE PRESIDENT,
DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED
STATES.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
GARLAND, J. This case is substantially the same, as that of
Minot against the same defendants, and we have come to the
same conclusion in relation to it.

The judgment of the Commercial Court is therefore annulled
and reversed, and it is ordered that the rule taken by the defend-
ants be discharged, with costs.

F. Wharton, for the appellants.

T. Slidell, for the defendants.

JEAN DOMINIQUE ROSENDA v. JACOB ZABRISKIE.

The renewal of a note and mortgage between the same parties, though the interest
which has accrued be added to the principal, is no novation—it is but a continuance
of the same transaction. Novation is the substitution either of a new creditor, a
new debtor, or a new debt. C. C. 2185. The pre-existent obligation must be ex-
tinguished; if only modified, and any stipulation of the original obligation remains
there is no novation. Ib. 2183.

A promise to pay usurious interest is not such a natural obligation as will form a good
consideration for a legal contract. A natural obligation is one which cannot be en-
forced by action, but which is binding in conscience and according to natural justice.
C. C. 1750, § 2. To perform a promise is a matter of conscience; and if a con-
tract, not illicit or immoral, but to enforce which the law gives no remedy is ac-
tually performed, as where usurious interest has been paid, the money cannot be
recovered. But the continuance of a promise, contrary in itself to law, cannot be
enforced, however often the parties may change the evidence of it.

Where a contract stipulates for usurious interest, the creditor can only recover the
principal debt.

APPEAL from the District Court of the First District, *Bucha-*
nan, J.

Roselius, for the plaintiff. This case presents two questions :

I. Does an agreement to pay usurious interest produce a natural obligation ?

II. If it does, the second question arises, what is the effect of such natural obligation on the right of the parties to this suit ?

1st. The first of these questions has been already twice decided in the affirmative by this Court. In the case of *Perrilliat v. Pench*, 2 La. 429. Judge Porter, who delivered the opinion of the Court, says : "The 1751st article of the Louisiana Code, divides natural obligations into four kinds, and under the first head classes those which are invalid for the want of certain forms, or for some reason of general policy, but which are not in themselves immoral or unjust.

"The 1752d declares that although natural obligations cannot be enforced by an action, yet among their effects one is, that no suit will lie to recover what has been paid, or given in compliance with a natural obligation.

"By the 2284th it is provided, that the payment from which we might have been relieved by an exception that would extinguish the debt, affords ground for claiming restitution.

"But the article which follows that just cited, limits this exception to those which would extinguish all natural obligation."

The learned judge then notices the laws of Spain and England on the subject of usury, and remarks : "Were it not for the definition given to the natural obligation, in the 1751st article, we should have had great difficulty in deciding this cause." He then proceeds to observe :—

"To return, however, to our statutory provisions, by which the case must be decided, they declare that money paid under natural obligations cannot be recovered ; and they define as natural obligations those which are not immoral or unjust, but which may be rendered invalid, from some reason of general policy.

"Under which class does the contract, to obtain more than the legal rate of interest fall ? Were we to follow the opinions of Pothier, it would be stamped with turpitude of the grossest kind ; but since he wrote we believe different views of this subject pervade the civilized world. Many think, that not only it is not immoral to take as high a rate of interest as the lender can obtain, but that it is impolitic to prevent him doing so. Others think dif-

ferently. But we believe, that those who desire to repress the practice, are moved more by views of public policy, than a belief that the obligation has no force as a natural one. Indeed, the prohibition of the contract by name is an expression of the legislative understanding, that without such prohibition, it would be binding. Were it one immoral in itself, it would have fallen under the general declaration that contracts contrary to *bonos mores* are void; and special legislation in regard to it was unnecessary. We are of opinion, that the prohibition in relation to taking more than a certain rate of interest for money, is founded upon motives of public policy, and not because the contract is immoral. In other words, that it is not *malum in se*, but *malum prohibitum*, and that therefore, the exception must be sustained."

The point came again under the consideration of the court in the case of *Millaudon v. Arnaud*, 4 La. 544. In that case, the defendant had acquiesced in an account current rendered by the plaintiff, in which usurious interest was debited, and funds in the hands of the latter applied to its payment; and on that ground it was held, that the defendant's objection to the usurious interest could not be listened to. The court say: "It was decided in the case of *Perrilliat v. Pench*, that money paid on an usurious contract, could not be recovered back."

So that the first question can no longer be considered as an open one. Now let us see what is the operation of the legal principles thus clearly recognized on the present controversy.

2. The article of the Civil Code which forms the basis of the decisions above quoted (1752) provides, "that a natural obligation is a sufficient consideration for a new contract." Hence it follows as an irresistible consequence, that even if it be true that a part of the consideration of the contract, on which this suit is brought, consists of usurious interest, accruing on former loans, it cannot invalidate the obligation. By the new contract, the natural has been converted into a legal obligation.

The court will bear in mind that the excess of interest on the loan had been disallowed, and deducted by the District Court. The only matter in dispute between the parties, relates to usurious interest arising from previous loans.

It will, perhaps, be contended that according to the statement of

facts in the bill of exceptions, the last is only a renewal of former loans; that the different transactions are in reality but one; and that there was only a change of the evidence of the debt, and not of the obligation itself. But on reflection the court will be satisfied that this argument is more specious than solid. An obligation is just as effectually extinguished by novation as by payment. If the natural obligation to pay usurious interest had been extinguished by payment, it is clear that no action would lie to recover back what had thus been paid. But instead of payment, "the debtor," in the language of the 2184th article of the Civil Code, "*contracted a new debt to his creditor, which new debt was substituted to the old one, which was extinguished.*" It was alleged that the usurious interest then due formed a part of the consideration of the new contract, and that consequently the consideration is, *pro tanto*, illegal. But it is evident that the conclusion is not warranted by the premises. Nay, the very converse of the proposition is established by the decisions of the Supreme Court above quoted, and the explicit language of the 1752d article of the Civil Code. Zabriskie was bound by a natural obligation to pay the interest stipulated; the parties agreed to enter into a new contract; the consideration of which consisted partly of the natural obligation. Here then is the application of the principle laid down in the 1752d article of the code, "*that a natural obligation is a sufficient consideration for a new contract.*"

The Code Napoleon is silent on the subject of the effect of natural obligations. Still, the Court of Cassation, and all the French commentators recognize the correctness of the principle which I invoke.

Favord de Langlade, in his *Répertoire de la Nouvelle Jurisprudence*, examines the question, and cites a decision of the Court of Cassation. He says:

"*Une obligation naturelle peut-elle être la matière légitime d'une novation?*"

"*Le débiteur d'une rente mêlée de féodalité et pour ce motif abolie sans indemnité, est-il lié par une obligation naturelle, si la rente a eu pour origine une concession de fonds?*"

"*Si une pareille rente est volontairement novée, sans aucune*

prestation aujourd'hui prohibée, le débiteur peut-il être contraint à acquitter sa nouvelle obligation ?

"La Cour de Cassation a résolu affirmativement ces questions dans l'espèce suivante."

See also Toullier, vol. 6, pp. 194, 196, and 422. Paillet, p. 462, note 4, on article 1121 of the Code Napoleon.

Elwyn, for the appellant.

GARLAND, J. This case was before us in May, 1841, and remanded for a new trial, the injunction being sustained in part. 18 La. 346. We then directed, that oral evidence should be admitted to sustain the plea of usury. Judgment has again been rendered against the defendant, and he has appealed.

When the case was tried, the District Judge permitted evidence to be given to prove, that usurious interest for one year was included in the last note and mortgage, but refused to admit any evidence of anterior usurious interest being added to the principal. He reduced the interest to ten per cent, and sustained the injunction for the excess. The defendant alleges, that the Judge below erred, in refusing to admit evidence of usurious interest for previous years having being charged, and included in the note. The defendant offered to prove, that the debt claimed was originally a loan of \$3000, made some years (about four,) previous to the commencement of the suit; and that the note was renewed yearly, and usurious interest included in it at each renewal. It now amounts to \$7905. The Judge refused permission to the defendant to go behind the last act of mortgage, because he considered the renewal of the note and mortgage, a novation of the debt; and secondly, because the promise to pay usurious interest creates a natural obligation, which may be the foundation of a new and valid obligation. The counsel for the defendant took his bill of exceptions, and the case is before us on the two points.

The Judge of the District Court is, in our opinion, mistaken in supposing, that the renewal of the note and mortgage between the same parties, is a novation of the debt, although its amount may be increased by adding to it the interest that accrued. Novation is the substitution of either a new creditor, a new debtor, or a new debt. The renewal of a note between the same parties is but a

continuance of the same transaction. 8 Mart. 5 Ib. N. S. 157. Art. 2183, of the Civil Code, says, "the pre-existing obligation must be extinguished, otherwise there is no novation; if it be only modified in some parts, and any stipulation of the original obligation be suffered to remain, it is no novation."

The Judge is also mistaken, in supposing that a promise to pay usurious interest, is such a natural obligation as will form a good consideration for a legal contract. A natural obligation, is something binding on the party who makes it, in conscience and natural justice. Civil Code, art. 1750, No. 2. To perform a promise is a matter of conscience, and if a contract, not illicit or immoral, but to enforce which the law gives no remedy, is actually performed, the money cannot be recovered back again. This was the ground of the decision in the cases in 2 La. 429, and 4 La. 544, so much relied on by the counsel for the plaintiff; and the court has never gone further than that. But the continuance of a promise contrary in itself to law, cannot be enforced, although the parties may change the evidence of it every year. The payment of interest beyond a certain rate is, under our law, a matter of convention; and we think the doctrine has been extended far enough, in those decisions which rejected the demand to recover back usurious interest, after it had been paid. If the doctrine contended for by the counsel for the plaintiff, and sanctioned by the District Judge, were correct, a recovery could be had for any amount of usurious interest, if the contract had been reduced to writing, and then renewed. We cannot give our assent to such an interpretation of the law. It is well understood, that the law forbids more than ten per cent per annum, to be stipulated for in any contract; and neither the renewal of the contract, nor any devices to evade the law can be countenanced. On various occasions, this court has shown its determination to expose the means resorted to, for the purpose of evading the law, and has uniformly refused to enforce a usurious contract. 3 Mart. N. S. 622. 4 Ib. N. S. 167. 7 Ib. N. S. 409. 2 La. 115. And it is now the settled doctrine of this court, that any contract which stipulates for interest exceeding ten per cent per annum, is usu-

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rious and null, and that the creditor can only recover the principal debt. 3 La. 393. 6 La. 709.*

We are of opinion, that the Judge below erred in refusing to permit the defendant to show, that a large portion of the demand against him, was made up of usurious interest, and we must again remand the case for a new trial.

The judgment is therefore annulled and reversed, and the cause remanded for a new trial, with directions to the District Judge, to admit the testimony offered by the defendant, for the purpose stated in his bill of exceptions, and in other respects to conform to the principles herein settled, and proceed according to law; the plaintiff paying the costs of the appeal.

THE STATE v. THE UNION BANK OF LOUISIANA.

Under the second section of the act of 5th of February, 1842, ch. 22, reviving the charters of the Banks in the city of New Orleans, the Board of Currency are entitled to free access to the vaults and books of the Banks; may call upon their officers at any time; may take such memoranda and lists as they think proper and necessary; and may require any officer of such Banks to submit their books and papers to their inspection and examination. But they have no right to call upon those institutions, to make out, at their own expense, statements not expressly required of them by law, though demanded by the Board for the purpose of obtaining information, which it is required by law to lay before the Legislature. The law only exacts that the members of the Board shall be allowed to examine, for themselves, the books and papers of the Banks.

The second section of the act of 24th of February, 1842, ch. 59, supplementary to

* Since the decision in this case, an act of the 19th February, 1844, chap. 25, has altered the law on this subject. It provides:

Section 1. That article two thousand eight hundred and ninety-five, of the Civil Code of Louisiana, be so amended, that the amount of conventional interest shall in no case exceed eight per cent, under pain of forfeiture of the entire interest so contracted.

Section 2. That, if any person hereafter shall pay on any contract, entered into after the passage of this act, a higher rate of interest than the above, as discount or otherwise, the same may be sued for, and recovered within twelve months from the time of such payment.

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the act for preventing the farther violation of law by the Banks, which imposes a penalty on any president, officer, agent, or clerk of any Bank who shall fail to give a full and complete statement relative to its affairs when required by competent authority, was passed with reference to former laws, and only points out the punishment to be inflicted on those violating their provisions.

APPEAL from the District Court of the First District, *Buchanan, J.*

SIMON, J. The President of the Board of Currency complains that, in the discharge of its official duties, the said Board, on or about the 29th of October, 1842, made an application to the President, Directors, and Cashier of the Union Bank of Louisiana, for certain information, the purport of which is literally recited in the petition; that in order to facilitate the furnishing of the information and statement, the Board of Currency prepared and sent to the Bank, the forms in which said statements were to be made; that the information required is material and important to the Board of Currency; and that the defendants have illegally and peremptorily refused to furnish said information, contrary to the acts of the Legislature passed in 1842, which have been accepted by the defendants, and have thus become a part of the charter of their institution. A writ of mandamus is prayed for, to be directed to the President, Directors, and Cashier, and to the Union Bank of Louisiana in its corporate capacity, commanding them to furnish the information and statements required, or to show cause to the contrary, &c.

The Bank first excepted to the form of this application, on the ground that Germain Musson, as President of the Board of Currency, cannot maintain any action, or appear in court. It further averred, that there is no law requiring them to give the information and statements demanded; that the demand of such information is unnecessary, vexatious, and arbitrary; that if it had been disposed to give the same, the time allowed is not sufficient, and that it would cost the institution extra clerk's salary to the amount of one thousand dollars at least, to make the statements demanded, an expense which it is not bound to support.

The defendants' exceptions were overruled, and a peremptory mandamus was ordered to be issued. The defendants have appealed.

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The information and statements alluded to, and recited in the petition, were demanded of the defendants, by a letter, dated the 29th of October, 1842, as follows :—

1st. A statement, (in the form annexed,) showing the amount due the Bank on the 23d of December, 1841, and the amount remaining due by the same persons on the 26th of March past, and the 26th of November next. The form is now sent you, in order to allow sufficient time to prepare and fill up the first, second, and third columns of the statements, the fourth having to be filled only after the close of business, on Saturday, the 26th of November next.

2d. A list of the sums due on the 26th of November next, by other persons than those named in the above mentioned statement.

3d. A list of loans in the country.

4th. A list of loans to stockholders, and the proportion of loans to the number of shares held by them respectively.

5th. A detailed list of the real estate held by the Bank, and the cost thereof.

The evidence shows, that the application was made in order to obtain the information which the law requires the Board of Currency should obtain from the Banks, to prepare a statement for the Legislature ; and that the defendants declined furnishing it as required. The answer of the Cashier, in the name of the institution, says : " however, the books of the Bank will be always open for your inspection."

Several witnesses have been examined, to show the probable amount of the expense which the information and statements required would cost, and the time which they would take. Two of them estimate it at \$500 ; another says that \$300 or \$400 would be a reasonable compensation for the work ; and another says it would be worth from \$800 to \$1000. They differ also as to the time, according to the number of clerks employed. They all agree that it would take considerable time to make out the statements called for ; and one of them states that to do the work with perfect accuracy, would take, he supposes, two months.

R. D. Shepherd, who was the first President of the Board of Currency, testifies that in the exercise of his duties as such, he

never experienced any opposition on the part of the defendants; that, on the contrary, every facility was afforded him, and that all information required by him of the Union Bank was cheerfully furnished. He further states, that it would be highly improper to publish the names of all the debtors of the Bank to the public; but he should not consider it improper or impolitic to furnish it to the Board of Currency. The stockholders should know the true state of the Bank; and the witness proceeds to give his opinion on the effect, which the publishing of the names of the debtors of a bank would have upon its credit, &c.

It has been also admitted on all hands, in the argument of this cause, that the Board of Currency has always had free access to the vaults and books of the Union Bank; that this never was refused; and that the affairs of the Bank, as shown by the books and papers, have always been open to their examination and inspection.

The powers and duties which are exercised by the Board of Currency in this State, are exclusively derived from an act of the Legislature, approved on the 5th of February, 1842, ch. 22, entitled, "An act to revive the charters of the several Banks located in the city of New Orleans, and for other purposes," and from the several acts amending the same subsequently passed. Such powers, which are very extensive, are pointed out and described in the second section of that act, and our inquiry, therefore, must be limited to ascertaining whether the requisition made in this suit by the Board of Currency, comes within the extent of the powers given by the law under which the Board was established.

Every body knows the origin of the Board of Currency, and those who are in any manner acquainted with the state of the affairs of the country at that time, are aware of the reasons which induced the Legislature to adopt the law which brought it into existence. Its object was to put the several Banks of the State under the supervision and control of three Commissioners appointed by the State, whose principal duty, under the name of the "Board of Currency," should be to regulate their circulation, and "to take care," as the law says, "*that the paper money issued under the authority of the State be not depreciated.*" Have they succeeded, is a question which, perhaps, might be answered by

thousands, but which is not now under our judicial consideration. The powers vested in the Board, were to be used and exercised as a check upon the Banks; and the members of the Board of Currency, receiving their salaries from those institutions, became so far identified with their administration, as to be able at any moment not only to supervise their affairs, but to see *with their own eyes* how they were conducted.

The question then, which presents itself in this case, does not seem to relate particularly to the extent of the powers of the Board of Currency, but to the manner in which those powers are to be exercised. It is rather a question of action, tending to regulate the intercourse between the Board and the Banks, and to ascertain and establish the means which are to be resorted to, to obtain the object of the law.

Under the second section of the law above alluded to, (Laws of 1842, p. 38,) the Board of Currency is vested with the following powers:—

1st. *To supervise* the faithful execution of the act, and of the charters and bye-laws of all Banks working under it.

2d. *Thoroughly to examine the affairs of any Bank, whenever they may deem it expedient to do so*, and at least quarterly.

3d. To require of the President and Cashier of each Bank, on Saturday of each week, *the following statement* in a printed form, signed by them: 1. Capital realized, \$——. 2. Amount of "dead weight," under the respective heads of real estate, loans on stock, long loans, personal or otherwise, protested paper, and, in fine, of all assets not realizable within ninety days. 3. Movement of the Bank, to wit: loans on paper payable at maturity, and intended to meet the two-thirds of the cash liabilities unrepresented by specie; circulation; deposits, and other cash liabilities; specie and cash assets.

4th. Said statements shall be regularly filed in the office of the Board of Currency, and the statements so furnished on the last Saturday of each month, shall be signed by the President of the Board of Currency, and published in the State paper on the first Monday in each month.

5th. To call a meeting of the stockholders of any one of the

Banks, whenever expedient, to lay before them full reports of its operations during the year, and of its real situation, &c.

We have looked in vain in the law of the 5th of February, 1842, and in those which were subsequently passed to amend it, for any provision authorizing the Board of Currency to call upon the Banks for any statements similar to those required in the present suit. It is clear that this power is not contained in the second section, and that the statement therein mentioned, which is to be furnished by the Banks weekly and published monthly, is not intended to include and exhibit the various matters and detailed information which form the subject of the present controversy. Indeed, it would be requiring more than the law provides, that is to say, it would be subjecting the Banks to a more burthensome and expensive task than is contemplated by law; for the execution of which they would incur considerable and unnecessary expenses. As the law stands, it seems that the information here required, would be properly the result of the *thorough examination* of the affairs of the Banks, to be made by the Board of Currency, and of the investigation which said Board is empowered to go into, whenever they may deem it expedient. For this purpose, they have free access to the vaults and books of the Banks; they may call upon their officers at any time; they may take such memorandums and lists as they may think proper and necessary; and the President, Directors, Cashier, or other officers of any Bank cannot refuse to submit their books, papers, or documents to the inspection and *thorough examination* of the Board of Currency. This, we understand, to be the extent of the duties which are imposed by law upon the Banks, in their intercourse with the Board of Currency, and is, in our opinion, the safest course which can be adopted to ascertain the exact situation of their affairs. It has been shown, that the defendants have never refused to submit the affairs of their institution to the inspection of the Board. Nay, it has been admitted, that their books and papers have always been open to such examination. No complaint has been made of the Union Bank ever having failed to furnish its weekly statement, as required by law; and we cannot concur with the Judge, *a quo*, in the opinion, that the information here required, should be obtained by means of the statement demanded, at the

exclusive expense of the defendants. It may easily be derived from an examination of the books of the Bank, which the members of the Board are at liberty to inspect with their own eyes; and is all the law requires.

We have been referred to the second section of an act of the Legislature, entitled, "An act supplementary to an act, entitled, 'an act to prevent further violation of law by the Banks,'" approved on the 24th of February, 1842, which imposes a penalty upon any director, president, officer, agent, or clerk of any Bank, *who shall fail to give a full and complete statement, when required by competent authority.* This law was passed in reference to former laws, and means nothing more than to point out the punishment which should be inflicted upon those guilty of violating the former provisions. Still, the question would recur, what statement does this law allude to? In the case of the statement which is to be furnished by the Banks to the Board of Currency, which is a competent authority within the meaning of the act, it cannot be doubted that reference should be had to the second section of the law of the 4th of February, in order to ascertain the nature of the statement to be given, *when required*; and surely, it cannot be contested, that this penal law cannot apply to the failure of furnishing any other statement but the one required by the section above recited. It is clear, as we have already said, that the Banks are not bound to furnish any other statement, and that their officers could only be punished in case of their failing to give such a statement, *as is required by law.*

It is therefore ordered, that the judgment of the District Court be reversed, and the rule obtained below discharged, with costs.

Preston, Attorney General, for the State.

H. R. Denis, for the appellants.

THE STATE v. THE LOUISIANA STATE BANK.

APPEAL from the District Court of the First District, *Buchanan, J.*

SIMON, J. This case presents exactly the same question as the one just now pronounced upon, and decided, in the case of *The State v. The Union Bank*. It must have the same result.

It is therefore ordered, that the judgment of the District Court be annulled, and reversed; and that the rule obtained below be discharged, with costs.

Preston, Attorney General, for the State.

Grima, for the appellants.

THE COMMISSIONERS OF THE MERCHANTS BANK OF NEW ORLEANS v. ETIENNE CORDEVOLLE and another.

Where the holders of a note, the payment of which the makers guarantied by the pledge of another note secured by mortgage, do any act by which the mortgage is destroyed, the endorsers of the first note will be released, they having a right to be subrogated to the mortgage. C. C. 3030.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
C. C. Parkhill, for the appellants.

A. Bodin, for the defendants.

MORPHY, J. The defendants are sued as endorsers of a note for \$5000, drawn to their order by Jonau, Metoyer & Co., and protested for non-payment on the 29th of February, 1840. They answer that their liability as endorsers, if it ever existed, has been released by the *laches* of the plaintiffs; that a note for \$10,000, secured by mortgage, was placed in their hands by the makers to secure the note sued on, and that no judgment can be rendered against them unless such collateral security be delivered to them, which the plaintiffs are unable to do; that the property

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upon which the note bore a first mortgage, has been sold at a judicial sale, and the Merchants Bank authorized the Sheriff to raise the said mortgage; that the money collected to pay the mortgage note was lost by the negligence of the plaintiffs, who took a judgment against the Sheriff only for \$5117 72, and moreover suffered the judicial sale to be perfected by a monition. Judgment was rendered below in favor of the defendants, and the plaintiffs have appealed.

The record shows, that the drawers of the note in suit, had lodged in the Merchants Bank, as collateral security, a note for \$10,000, drawn by Thayer & Hooker to the order of, and endorsed by Timothy C. Twichell, bearing date the 25th of February, 1837, which note, together with another one of the same date, amount, and maturity, was secured by mortgage on two lots of ground; that the mortgaged premises were seized and sold at the suit of the bearers of the last mentioned note, in April, 1840, and brought twenty thousand dollars. The whole amount of the adjudication was paid to the Sheriff, who conceiving that he had a legal right so to do, cancelled the whole mortgage on the property; but, by consent of parties, the price thus paid was to remain in his hands, until the homologation of a monition which had been sued out by the purchasers. Shortly after this sale, the Merchants Bank entered into an arrangement with Jonau, Metoyer & Co., by which they had themselves authorized to collect of the Sheriff \$5000, with interest from the 29th of February, 1840, at 7 per cent per annum, and \$3 costs of protest; and, on receiving that amount, they placed in the hands of that officer the note of \$10,000 pledged to them. They made no opposition to the monition, but exhibited to the Sheriff their authority from Jonau, Metoyer & Co.; and, on an offer to surrender up to him the mortgage note of \$10,000, demanded payment of their debt, which, with the interest stipulated, amounted to \$5117 72. After several ineffectual demands, the plaintiffs took a rule upon him, under article 767 of the Code of Practice, which was made absolute for \$5117 72, with twenty per cent damages from the 13th of July, 1840. No recovery being had either against the Sheriff, or his sureties, the present suit was brought in October last. The Judge below did not err in concluding, that the course pursued by the plaintiffs had released

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the defendants from their obligation, as sureties for the debt. They made with the pledgors a new contract, by which, on receiving the amount of their debt from a third person, they agreed to surrender the note pledged to them. On the neglect or refusal of the Sheriff to pay, they might have returned to Jonau, Metoyer & Co., their authority to collect, and have looked to the defendants for payment; but knowing that the Sheriff had in his hands an amount more than sufficient to pay their debt, and trusting to that officer, they sought to be paid out of the proceeds of the property sold, and to that effect obtained a judgment against him, with heavy damages for the delay; thus ratifying the illegal payment of the whole price into his hands, and the seizure of the mortgage which secured the note pledged to them. This act, on their part, would preclude them, and therefore the defendants, if subrogated to their rights, from resorting to an hypothecary action, to obtain from the purchaser the proportion of the price they were entitled to, as holders of the note of \$10,000. They thus destroyed by their act the mortgage to which the defendants had a right to be subrogated, and consequently released them. Civil Code, art. 3030. The whole course of the proceedings of the plaintiffs clearly shows, that they had accepted the Sheriff as their debtor, and approved his acts in relation to the money he had received as the proceeds of the property, on which they held a mortgage. If he has proved unfaithful, or has become insolvent, the loss must be theirs. They cannot be permitted to throw it on the defendants, who never assented to those proceedings, and were not even consulted in the matter.

Judgment affirmed.

THE FIREMENS' INSURANCE COMPANY OF NEW ORLEANS v.
JULIA LOUISA CROSS.

Art. 2256 of the Civil Code, which forbids the introduction of evidence against, or beyond what is contained in public acts, does not apply to contracts made *in fraudem legis*. A party may show by parol the real nature of such contracts.

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A wife, who has mortgaged her paraphernal property to secure the payment of a loan, which was received by her husband, and did not enure to her benefit, though appearing alone in the contract, as having borrowed the amount with the authorization of her husband, may show by parol the real character of the transaction, and exonerate herself.

Under no circumstances can a wife become surety for her husband. The form of the contract will be disregarded. Those who treat with married women, must see that the obligations they contract turn to their advantage.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Lockett and Micou*, for the appellants.

W. Christy, for the defendant.

MORPHY, J. This action is instituted on a promissory note for \$7000, drawn by the defendant, authorized by her husband, to the order of, and endorsed by, Frederick Beckman, and secured by mortgage on three lots of ground, her paraphernal property. The defence is, that the note sued on, which bears date on the 26th of October, 1839, is a renewal of a similar one given to the petitioners in October, 1838, which was also secured by mortgage on the same property; that although in both acts it is stated, that the defendant was indebted to the plaintiffs for money loaned to her, the consideration for which these notes and mortgages were in truth given, was a loan made to her husband, Osborn Cross; that she never received any part of the money; that the debt did not, in any way, enure to her benefit or advantage; and that these facts were fully known to the petitioners. There was a judgment below for the defendant, and the plaintiffs appealed.

In the two acts of mortgage, the defendant appears alone as a borrower, with the authorization of her husband, and mortgages her paraphernal property to secure the notes, which purport to be given for cash loaned to her; and in the same acts, Osborn Cross and Frederick Beckman separately obligate and bind themselves, *in solido*, to the plaintiffs, for the payment of the said notes.

On the trial, the court overruled the objection of the plaintiffs, and permitted the defendant to show by testimony, that the loan was in fact made to Osborn Cross, the defendant's husband, and not to her, as expressed in the act of mortgage. The legality of this decision is submitted to us on a bill of exceptions. The Judge decided correctly. The article of the Code relied on,

which forbids the introduction of evidence against, or beyond what is contained in public acts, does not apply to contracts made *in fraudem legis*. If such an exception did not exist, and if it were not open to the defendant to show the real nature of the transaction, the laws made for the protection of married women would have no effect whatever. In every case their provisions could be evaded, by giving to a prohibited contract the garb and semblance of one perfectly legal, and thus would be done indirectly, what could not be done directly. 8 Mart. N. S. 692. 7 Ib. N. S. 341.

The evidence establishes in substance, that Osborn Cross had no other means of living than his pay as an officer in the army, which was about sufficient to defray his expenses; that in the fall of 1838 he had debts, was pressed for money, and was attempting to borrow some. That a few days after this loan was made, he paid off debts to the amount of \$3000; that no portion of the money loaned was ever paid to the defendant, but that it was paid by the plaintiffs to different persons on orders, given by her husband; and no attempt was made to show that any portion of this loan enured, in any way or shape, to her benefit and advantage. We are satisfied that the money borrowed was intended for, and was applied to the use of the defendant's husband. The circumstance of the wife appearing alone in the contract, as having borrowed the money with the authorization of her husband, cannot distinguish this case from those in which we have so frequently exonerated married women, from contracts entered into jointly and severally with their husbands, when it is not shown that the debt has enured to their benefit. Were it otherwise, the husband and the obligee, in loans made to the former, would invariably give this form to the contract, and thus commit a fraud upon the wife. This case is much stronger than that of *Brandegee v. Kerr and wife*, (7 Mart. N. S. 64,) in which it appeared that the wife had actually received the money, but there was no proof of its having turned to her separate advantage. Under no circumstances can a wife become surety for her husband, according to our laws; and the form of the contract will be disregarded, if, in point of fact, she turns out to be a mere surety, when she was made to appear in the light of a principal. It is for those

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who treat with married women to be upon their guard; and see that the obligation she contracts turns to her benefit and advantage. 7 Mart. 484. 2 Ib. N. S. 395. 5 Ib. N. S. 431. 7 Ib. N. S. 252. 8 Ib. N. S. 692. 9 La. 587. 10 La. 147.

*Judgment affirmed.**

* *Lockett and Micou*, for a re-hearing. 1. All the decisions, by which, the party claiming to enforce the contract of a married woman, is held to proof that the contract enured to her benefit, are based upon the Spanish laws.

2. Those laws having been repealed in 1828, the obligations resulting from contracts of married women, must be tested by the provisions of the Civil Code alone.

3. Under the code the contract of the wife, authorized by the husband, is valid, unless it conflicts with some express prohibition of the law.

4. The burthen of proof that such conflict exists, now rests upon the wife.

First. The leading case on the subject is that of *Durnford v. Gross and wife*, 7 Martin, 489. The decision turned upon the question, *whether* the 61st law of Toro was not repealed by the code. By that law, the contract was not binding unless it *was proved* to have enured to the benefit of the wife. Such proof was a part of the plaintiff's case. The court held that the several articles of the code, allowing married women to contract, should be construed with reference to this co-existing law, and judgment was rendered accordingly. But the arguments, both of the counsel and the court, lead to the conclusion, that if the 61st law of Toro had not been in force, the decision would have been otherwise.

The case of *Brandegge v. Kerr* decided in 1828 was upon a contract governed by the same law, and rests upon the authority of the case already quoted. 7 Mart. N. S. 64.

The case of *Davidson v. Stuart*, 10 La. 147, was decided obviously upon the authority of the preceding cases, and without inquiry as to any change in the law. Now, the provisions of the present code being substantially the same with the enactments of the code of 1806, and the law of Toro having been repealed, it follows :

Second. That the case must be decided by the provisions of the code alone.

Third. The code provides : that the wife cannot grant, alienate or mortgage *unless with the consent of her husband*. Art. 124.

That the *incapacity* of the wife to contract, is *removed* by the authorization of the husband. Art. 1779.

That the wife may alienate her paraphernal property, with the authorization of her husband. Art. 2367.

That she cannot, except with the authorization of her husband, alienate her immoveables. Art. 2411.

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These articles, with others providing for special cases, establish the principle, that the wife, with the consent of the husband, may make any contract, which she could make if unmarried. The distinction taken by the Judge below, that she may alienate, but not mortgage, is not supported by the law. The provision that she cannot mortgage, (art. 124,) without the consent of the husband,—being equivalent to a permission to mortgage with his consent, even if the word alienate did not include that of mortgage, which is a species of alienation.

The only exception to the principle thus established is, that the wife cannot bind herself with her husband, or for him, for debts contracted *by him*, before or during the marriage. Art. 2412.

Then the law is not, that to bind the wife upon her contract, proof must be made that it enured to her benefit; but that the wife may bind herself by her contracts, authorized by her husband; except in case of binding herself for his debt.

Fourth. In this state of the law, it would seem on fair principles that the wife, who has contracted an obligation in the form prescribed and permitted by the code, is bound by her contract, unless *she proves* that the case comes within the exception.

Fifth. The contract in this case, is a mortgage in due form of law, upon paraphernal property of the defendant. Then it is a contract permitted by the law. Arts. 124, 2367.

The defence is, that the amount of the loan was received by the husband, and applied to his own use.

The wife has the right to administer her paraphernal property. If she does not choose to exercise this right, it devolves upon the husband, or it may be exercised by both. Arts. 2361, 2362, 2363.

The record shows, that there was no separation of property between the defendants, until after the institution of this suit; and, that the husband did administer the paraphernal property.

From the moment of signing the acts of mortgage, the right to receive the amount of the loan, became a personal right to be exercised even in justice, by the husband. Code of Practice, art. 107.

Of course he had, as administrator, the right to receive the loan, and payment to him was, in law, payment to the wife.

The condition of the lender would be indeed onerous, if he were forced to become the surety of the person to whom he is compelled to pay.

If the money in question had been a debt due the wife as paraphernal, the payment to the husband would have been a good payment, and it could not be maintained that the debtor must look to its application after payment. He is not the guardian of the wife, and any attempt to control the husband in his administration of the wife's property, would be unwarranted and impertinent.

The law declares, that if dotal property be sold, the proceeds or value must be re-invested in other dotal property. Yet this court, within a few weeks, has decided that it is not the business of the purchaser, to see to the re-invest-

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ment of the price paid by him. That duty the law leaves to the husband, and the mortgage upon his real, and privilege upon his personal estate, are the security which the law has given to the wife, to secure the faithful performance of his trust. *Montfort v. Her Husband*, ante, p. 453.

Still stronger is the law in case of the sale of paraphernal property. The law does not require the re-investment of the proceeds. It provides for the case of the receipt of the money by the husband, and the conversion of it to his own use; and the security given to the wife is not, that she may rescind the contract and recover the property, *but that she shall have a mortgage for its return*. Civil Code, art. 2367.

The maxim *expressio unius, &c.*, again applies with great force. If the law intended to give the right to rescind; it would have so enacted; while, as the law stands, the granting of a mortgage upon the husband's property, excludes the idea that the right to rescind exists, because it is inconsistent with the other. The wife cannot claim both the price and the property; and where the law says how the price shall be secured to her, it in substance enacts that she has no further claim upon the property. It does not put her upon an election between inconsistent rights.

We have already seen that the law makes no distinction between mortgages and alienation; the latter word is used in art. 2367; but the greater includes the less power, and the same rule must apply whether money is raised by mortgage, or by a sale of the paraphernal property.

Under the laws existing at the time of the decision of *Durnford v. Gross*, as construed by the court, the wife might mortgage her estate with the authorization of her husband, provided the mortgagee should be always ready to prove that the mortgage was for her benefit. Law 61st of Toro.

Now, the enactment of the code remaining the same, and the proviso, having been repealed, it follows simply that the wife may make a valid mortgage, if authorized by the husband. If the decision of the court, in this case, be affirmed, the repealed proviso will be revived by judicial decision, and added to the code.

As the law then stood, the party making a loan, was put upon his vigilance to see how the money was applied. The application of the money became a part of his case; and, in making the loan, he had reason to insist upon a superintendence of its distribution. But, if the law has been changed, it is no longer the duty, or the right of the lender, to require from the borrower a disclosure of the purpose to which the money is to be appropriated.

We conclude, that the defendant is bound by this contract, unless she has proved that it came within the prohibition of the law.

The only restriction upon the rights of the wife, (authorized, &c.) to contract and bind herself by her contracts, is, that she shall not bind herself with her husband, or for him, "for debts contracted by him, before or during the marriage."

If the wife, in her own name, obtains a loan to be secured by mortgage upon her own property, the debt cannot, in any sense, be said to have been

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contracted by the husband. It is simply the contract of the wife, and not the less valid, if the husband binds himself for the same debt, for the law does not prohibit the husband from being the surety of the wife.

The payment of the money to the husband does not affect the validity of the transaction, or prove collusion because he is the agent of the wife.

If, on the other hand, the plaintiff knew that the money was intended for the husband alone, and, with that knowledge, accepted the mortgage of the wife, the transaction would be a fraud within the prohibition of the law, and therefore void. Knowledge or collusion must be brought home to the plaintiffs before the contract can be touched. But the defendant has neither alleged, nor attempted to prove, that such knowledge or collusion existed. She rests her case upon the proof that the husband received the money, and upon the presumption that he used it for his own purposes, because, it is not shown to have enured to her benefit.

We therefore contend, that the incapacity of the defendant being removed, her contract must be governed by the same rules as the contracts of other persons; that the payment to the husband, or to his order, was well made; and that the plaintiffs are not responsible for the misappropriation of the money. We further contend, that the misappropriation of the money, if proved, gives no right to annul the contract, but only creates a mortgage upon the estate of the husband.

No imputation of fraud or collusion can rest upon the plaintiffs. They have advanced, upon the faith of the defendant's promise and mortgage, the large sum of \$7000 of their own money; and a defence by which either the husband or the wife is to be protected in the enjoyment of this money, without the obligation of returning it, is one not to be favored by the law. It is true that the law protects the rights of married women; but it ought not to be used by them, to obtain possession of the money of others, and then to repudiate the promise to repay it.

Re-hearing refused.

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A claim is sufficiently liquidated to be susceptible of compensation, when its correctness is admitted by the debtor.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

C. Janin, for the appellants.

J. Seghers, for the opponent.

MORPHY, J. This is an opposition to a tableau of distribution

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filed in this case, from which it appears, that there is nothing coming to the ordinary creditors; the balance remaining, after the payment of the privileged debts and law charges, being covered by the legal mortgage of the insolvent's wife. The opponent, Valery Landry, as one of the testamentary executors of the late Antoine Peytavin, claims on behalf of the estate, and according to an account annexed to his opposition, \$3952 41, with the vendor's privilege on \$2205, the price of the slave Celeste and her children, bought by the insolvent at the sale of the succession property. The Judge allowed the privilege claimed, to the extent of \$1102 50, the second instalment of the price of the slaves, together with interest on said sum, at the rate of ten per cent per annum, from the 15th of January, 1838. The syndic, and the children of the insolvent have appealed.

There appears to be no dispute as to the correctness of the account, in relation to the sums charged, or credited to the insolvent; but it is urged, on the part of the appellants, that the price of these slaves was paid by, and compensated with other sums due to the insolvent by the estate of Peytavin, and that there is no privilege for whatever balance may remain due to the said estate.

The record shows, that in 1833, Songy Reynaud was entitled to claim \$5333 33, from the estate of Antoine Peytavin, as the sole liquidator of the partnership which had existed between him and Jean Reynaud, and which had been continued between him and the heirs of the said Jean Reynaud; and that he was, moreover, a creditor of the deceased for the sum of \$9043 82, making together, that of \$14,377 15. That, in December, 1836, at the sale of the property of the estate of Peytavin, Songy Reynaud purchased the slave Joseph for \$1379, and Celeste and her children for \$2205, payable, one-half on the 15th of January, 1837, and one-half on the 15th of January, 1838, but never delivered his notes according to the terms of the adjudication. On the 1st of June, 1836, Songy Reynaud drew on Valery Landry a draft in favor of C. Squier & Co., for \$2188 36, with interest at the rate of eight per cent per annum, until paid. This draft was accepted by the executor, to be paid out of the funds which might be lawfully coming to the drawer, who, besides, received money from

the executors, from time to time, and gave his receipts, which mention that the payments were made in deduction of his claims against the estate. From a close examination of the sums acknowledged to be due by Songy Reynaud to the estate of Peytavin, on an account rendered contradictorily with him, of those since paid to him, or for his account by the executors, as well as of the portions of the price of the slaves which had become due before the 15th of January, 1838; we are satisfied, that even if compensation could take place, the whole claim of Songy Reynaud against the estate had been already extinguished by compensation, when the second instalment of the slaves fell due; and that, therefore, it remains unpaid, and is included in the balance claimed. The counsel for the appellants has contended, that the sum of \$14,377 15, due to the insolvent by the estate of Antoine Peytavin, became liquidated, and susceptible of compensation only in 1839, when the account filed by the executors was finally homologated by a decree of the Supreme Court; that this happened long after the maturity of all the instalments of the price of the slaves, which were thus extinguished by compensation. We do not think so. The account of the executors, filed on the 9th of May, 1837, acknowledged the insolvent's claim as a partner, for \$5333 33; and, as a creditor of the succession, he was therein set down for \$6679 06. The main object of Songy Reynaud's opposition to this account, was to have the latter sum carried to \$9043 82, and his opposition was sustained, on the ground that his right to this sum had been admitted by the executors, who had acknowledged and approved his account, and that it was not shown or pretended that such acknowledgment had been made through error. See 13 La. 121. The precise date of this acknowledgment does not appear from the record; but in a petition presented by the insolvent, Songy Reynaud, to the Court of Probates, on the 16th of August, 1836, it is alleged to have been made before that time. A claim is sufficiently liquidated to be susceptible of compensation, when its correctness is admitted by the debtor. The judgment of the Supreme Court did not liquidate the claim, but only declared the acknowledgment made by the executors binding on them. All the other sums set down in the account, as due to, or by the estate, and which were not em-

braced in the opposition, became liquidated by the acknowledgment therein made of them, or, at least, by the homologation of the account, which took place on the 29th of May, 1837. As to the check, or order of Songy Reynaud, in favor of Squier & Co., which, it is said, was paid only in 1839; it is clear, that from the 16th of June, 1836, when it was accepted by the executors, to be paid out of the funds coming to the insolvent, the amount for which it was drawn could no longer be considered as money in the hands of the executors, belonging to the insolvent. From the appropriation of this sum, and the receipts given by the insolvent for the money paid to him from time to time, it is apparent, that he did not intend to off-set his claim against the instalments of the price not yet due; for, had the whole price of the slaves been first deducted, there would not have remained a balance sufficient to have paid the sums thus received.

Judgment affirmed.

WILLIAM WEST FRAZIER and another, Receivers, &c. v. JACOB WILLCOX, and another.

In ordinary cases of attachment, or where a judicial sequestrator is necessary, the law has provided an officer, to wit, the sheriff, to take care of the property seized; but he is to act only in the event of the parties failing to appoint a fit and proper sequestrator, or keeper of their own selection.

Art. 2941, *et seq.* of the Civil Code, which authorize the appointment, and prescribe the duties of conventional sequestrators, do not prevent parties from conferring other powers on such officers.

Parties interested in a debt or other property, may appoint agents to take care of their interest, and vest them with all necessary powers. C. C. 2954, *et seq.*; and an action may be maintained in the name of the agent, as well as in that of the principal, if power to that effect be given.

The judges of the inferior courts cannot, of their own accord, appoint receivers for the purpose of collecting or keeping funds, or evidences of debt which may be the subject of litigation before them. Such appointments can be made only with the consent of all the parties interested, and the assent of the judge can add nothing to the powers of the persons so appointed.

An attaching creditor can have no higher or better right to the property attached than his debtor, unless he can show some fraud or collusion by which his rights have been impaired. Liens or privileges existing on the property must be respected.

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A garnishee has no right to interfere in the merits of the case as between the plaintiff and defendant. He is to be viewed as a stakeholder, bound to disclose the truth. If his declarations be controverted, he may support them, and may oppose any decision that will operate to his prejudice. As to him, the questions are, is he indebted, and whether he can safely pay to the plaintiff. Where there is any doubt as to the validity of the payment, a stay of proceedings will be ordered, or security to indemnify the garnishee will be required.

The Legislature has power to prohibit foreign corporations from contracting in this State; but until it does so, contracts so made will be enforced.

The capacity of a foreign corporation to sue, is well established.

A contract made in this State, by the Bank of the United States, created by the State of Pennsylvania, to secure the re-payment of money loaned here, is valid.

Arts. 423 and 437 of the Civil Code, cannot be construed to forbid corporations created by other States, from contracting in this. Art. 423 is directory only, and declares that corporations, meaning those in the State, must be created by the Legislature. The alternative expression, "*unauthorized by law, or by an act of the Legislature,*" in art. 437, shows that it alludes to other corporations than those created by the Legislature of this State, and intended to acknowledge the public character of corporations authorized by the laws of foreign States.

The act of 13th March, 1837, ch. 66, relative to limited or anonymous partnerships, does not apply to corporations, but to private associations of individuals.

Nothing in the charter of the Bank of the United States created by the State of Pennsylvania, prohibited it from making loans in Louisiana, at the highest rate of interest allowed by the laws of the latter State; and such loans are not usurious.

A foreign corporation authorized to contract in this State, may contract according to its laws, where the charter contains no prohibition.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

GARLAND, J. The petitioners, styling themselves to be receivers appointed by the Commercial Court, with the consent of all parties, in the suit of the *United States of America v. The President, Directors, & Co. of the Bank of the United States, Bacon and others, intervenors*, represent that the defendants are indebted to them in the sum of \$7,733 33, with interest at ten per cent, from the 17th June, 1837, and costs of protest, on two promissory notes, drawn by Willcox, to the order of Willcox, Anderson & Co., and endorsed by them, which notes are secured by a mortgage executed on the 29th July, 1837, to the Bank of the United States, and accepted by their agent, Jno. Minturn, President of the Merchants Bank of New Orleans. The petition states, that in the suit of the *United States v. The Bank of the United States*, the notes were attached as the property of the latter, and that they have been since claimed by certain persons, as assignees

of these notes, and of a large amount of other property, by virtue of several assignments made by the Bank ; pending which controversy, the petitioners were, by consent of all parties then interested, appointed to collect and receive the sums due from all persons, with full powers to sue and recover the same : wherefore, they pray for judgment.

To this suit the defendants excepted : 1st. That all the matters in relation to this claim, were pending in the suit of the *United States v. The Bank of the United States*, already mentioned. 2d. That the plaintiffs have no claim against them, and have no legal authority to institute and maintain this suit. 3d. That an attachment has been levied upon the amount claimed at the instance of George Beach, in another suit in the same court, of which the respondents have been duly notified ; and that the assignment under which the present plaintiffs claim, is fraudulent, and without consideration.

They, therefore, pray to be dismissed ; which prayer being rejected, and the exceptions overruled, the defendants answered.

Admitting the execution of the notes, and mortgage, they aver that the loan of money which they are intended to secure, was made in this State, by the Bank of the United States of Pennsylvania, which had established a branch banking house and agency in New Orleans, conducted by citizens of the State, for the benefit of the aforesaid Pennsylvania corporation, which was contrary to the laws of this State, and its *known policy*, and highly injurious to its interests. They aver that, consequently, said contract cannot be enforced.

The defendants further allege, that usurious interest is claimed, as the contract is to pay ten per cent per annum, whilst by the charter of the Bank, not more than six per cent per annum, can be received by it.

They also deny that the United States can recover against them, as their claim against the Bank is not established. They deny the right of the assignees of the Bank to recover, because the assignments are invalid ; and allege, if the Bank of the United States has any right to recover, that the loan or consideration given for the notes sued on, consisted of notes of the Bank, and if liable at all, which is denied, they pray to be condemned to pay

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in the notes of that Bank. They pray for a judgment in their favor, and annex a variety of interrogatories, which seem not to have been answered; nor was any attempt made by either party to procure answers, although an order to that effect was made.

Upon the merits, there was a judgment for the plaintiffs with interest, at six per cent per annum, and the defendants have appealed.

The points that have been raised in the case, and insisted on, are:—

1st. The power of the plaintiffs to maintain this action.

2d. The effect of the attachment of George Beach.

3d. The authority of the Bank of the United States to contract and sue in this State.

4th. The plea of usury.

A mass of testimony comes up with the record, in a most confused and irregular form, much of which relates more to the financial operations of a few individuals and corporations, than to the legal questions which the case presents. It is too voluminous to be fully stated. We shall, therefore, in connection with each point, state what we consider as established by it.

The question of the pendency of another suit of the United States and the Bank of the United States against the defendants, is, we think, involved in the first question we propose to consider. In relation to that, it is shown that on the 20th of January, 1842, the United States, by their Attorney for the Eastern District of this State, commenced a suit by attachment, in the Commercial Court, against the Bank of the United States, incorporated by the State of Pennsylvania, claiming a sum approaching nearly to two millions of dollars. An attachment was issued, under which notes and claims to an amount largely exceeding \$2,000,000 were seized, and taken into possession by the Sheriff; the debtors were summoned as garnishees, and called on to answer what they were owing the Bank, or what property or money belonging to it was in their possession; and a judgment was asked against them. Among the notes seized, and persons cited, as garnishees, were the notes and persons now before us. A supplemental petition was filed about two months after the original, representing more particularly the claim of the United States, and

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reducing the demand to about \$366,000, for which judgment was prayed, and these defendants and others were made garnishees, or continued as such, and a judgment asked for. The defendants answered at great length, the purport of which is, that although they gave the notes, their amount cannot be recovered; and they ask to be dismissed. Pending these proceedings, three persons claiming to be the assignees of the Bank of the United States, of all the debts and property attached, intervened in the suit, and claimed the whole as belonging to them, presented an assignment, and asked for a judgment giving them the whole property and evidence of debts.

On the 16th of April, 1842, the following order was entered in the case:—

"The United States of America v. The President, Directors & Co., of the Bank of the United States. On motion of Baylie Peyton, United States District Attorney, and of J. R. Grymes and Thomas Slidell, of counsel for the various intervenors in this cause, and also, as attorneys of the defendants appointed by this court, and on suggesting to the court, that the assets covered by this attachment, from the state of monetary affairs and other causes, are subject to depreciation; and that the litigation herein may be of long continuance; and it appearing to the court, that the appointment of receivers to collect the debts covered by this attachment, and to administer generally the property attached, is important for the interests of all parties concerned, it being understood, that said intervenors hereby waive no claims for indemnity, for any thing done, or to be done herein: It is ordered, that William West Frazier and Christopher Adams, Jr. be appointed joint receivers; that they have full power to take charge of, and administer the property attached herein, and to pursue and collect by due course of law, the debts herein attached, and to that end to employ suitable counsel at the charge of said fund, and to do such other acts, and things, as appertain to the duty, and business of receivers; and that said receivers do hold such appointment, subject to such orders, and instructions as this court from time to time shall establish for their guidance in the premises; and that said receivers shall receive such compensation as the court shall

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establish to be paid out of such funds ; and it is further ordered, that said receivers be dispensed from giving bond."

This order and appointment were, as appears, instigated, and procured by the Attorney of the United States. His authority to consent to it has not been denied, and was in fact admitted by one of the counsel for the defendants. The counsel for the assignees, who were intervenors, also assented, as did the attorney representing the Bank, who had been appointed by the court ; and his act has been expressly and fully ratified since, by a resolution of the Board of Directors, and the assignees have given their assent also. Thus every party before the court, who was interested in the preservation of the property and the collection of the debts, consented to the appointment of the plaintiffs, and to the powers vested in them. From the nature of the property attached, much of it consisting of notes endorsed and falling due, secured by mortgage or other securities, it was very important to have some special superintendant, who would see it protected and properly managed.

Against the appointment and authority of the persons appointed as stated, the defendants and their counsel most loudly and zealously protest. They have undertaken to argue against the appointment in behalf of various persons, who do not complain themselves, and whilst they protest, that nothing can be recovered of them legally, they object to a party with whom their contested rights may be settled. The tribunal on whose records this assent and appointment is entered, has been denounced as usurping authority, and intending to introduce rules of practice, and principles new to our courts, and foreign to our jurisprudence. It is true, that the mode adopted of appointing the plaintiffs to exercise the functions which they claim, is somewhat novel in our courts ; but the circumstances are not of an ordinary kind. An immense amount of debt owing by a great number of individuals, is unexpectedly thrown into a litigation, likely to be protracted between the parties. The debtors of one party, in whose solvency the other is deeply interested, from the peculiar state of affairs, require to be watched, and securities to be made available ; and for the purpose of general security, the court permits the parties interested, to appoint their own agents and keepers of the pro-

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perty; and, approving of them, directs the Sheriff to deliver to these agents or receivers, the property in his custody, that it may be administered for the benefit of all concerned; the court taking care to have those persons under its control, that it may see, that the trust is faithfully administered.

In ordinary cases of attachment, or when a judicial sequestrator is necessary for the purposes of justice, the law has provided an officer, to wit, the Sheriff, to take care of the property seized. He is to act, in the event of the parties failing to appoint a fit and proper sequestrator, or keeper of the property. But this conservatory provision of the law, does not preclude the parties from making any other arrangement, that will be more to their interest, and which may promote their common convenience. Art. 2941, of the Civil Code, authorizes the appointment of conventional sequestrators. Subsequent articles prescribe their duties. But because this is specified, it does not prevent the parties from conferring other powers and authority. A conventional sequestrator cannot by law dispose of the thing in litigation, without the consent of the parties; but if those interested choose to assent, we know of no law to restrain them, and the contract would be binding afterwards. Suppose a number of horses or cattle to be in litigation, and sequestered; and that it should be inconvenient, or impossible for the Sheriff to take care of them, the parties may surely place them in the care of any person, or persons they may select, and if they think proper direct them to be sold, and the proceeds to abide the result of the decision. In such a case, if it be necessary, in order to protect the property from injury or destruction, we have no doubt, that the sequestrator could maintain any action or suit that might be necessary. Many cases can easily be supposed, where the conferring of such authority would be useful and convenient.

But it is said, that the plaintiffs are not conventional sequestrators, as they are not so called, and that we cannot presume, that the authority and duty appertaining to such were intended to be conferred. It may be that the Judge of the inferior court has not selected a name familiar to us, and known to our system of laws; yet, it is very certain, that both he and the parties intended to do something, and they have conferred on the plaintiffs powers and

authority well known to us. When we look into the law in relation to agency, we find ample authority for the acts of the parties in this case: parties owning or interested in a debt, or property, may appoint agents to take care of their interests, and vest them with all necessary powers. Civil Code, art. 2954, *et seq.* A power to sue, to collect a debt, to give an acquittance, or to do any other act, may be deputed, and an action may be maintained in the name of the agent, as well as in that of the principal, when power is given to that effect. The debtor will be protected, if the power to receive is sufficient. The appellation of receiver may not be exactly appropriate; but a legal name is only important, when it is necessary to enable us to ascertain the authority and duties appertaining to the place. But when the powers and functions are specified, it is not difficult to assign the character and legal species; and if our laws have not given a name, we may be justified in seeking elsewhere for one that is appropriate. To us it appears, that the plaintiffs stand in the relation of agents to the United States, the Bank of the United States, and the assignees of the latter, and that as such they can sue, and discharge the defendants whenever they shall pay the debt claimed of them.

If it were not in the power of parties to enter into compromises, and confer authority on third persons, for their mutual benefit, much injury might result. The case before us is strongly illustrative of the position. Three parties are litigating about their respective rights; a very large amount of debts is owing to one of them; the other two claim those debts, or the benefit of them; all are interested in their safety, and prompt collection; and mutually agree, that so much of the rights of all or either, as may be necessary to preserve the things in litigation, shall be vested in some disinterested persons, who shall act for the common benefit. If some such power had not been conferred, it is apparent, that severe losses must have been the consequence. This appointment is denounced, not by a party interested in preserving the debt and security, but by the debtor, who complains, that it is very hard, that all agree that he shall pay to particular persons, and thus relieve his property from mortgage, and himself from interest, which is alleged to be usurious. It cannot be possible,

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that the rights of litigants are so shackled by proceedings in an attachment, that they are unable to concentrate all their rights against a garnishee, when necessary to save the debt about which the suit is pending. Parties are not bound to stand still, and see the alleged common debtor wasting his means, and depriving them of their security, without the hope of relief; nor are courts so powerless as to permit it. If no positive provision had been made in a case where so much injury must result, a court would be justified in resorting to the equity power conferred by the 21st article of the Civil Code.

In deciding that the plaintiffs can maintain the present action, we are not to be understood as giving our sanction to an opinion sometimes expressed, that the Judges of the inferior courts, without the assent of the parties to a suit, or with the consent of only one of them, can exercise the powers of a chancellor, and appoint of their own accord receivers for the purpose of collecting, and keeping the funds attached, or that may be the subject of litigation. Our opinion is, that the capacity of the plaintiffs is derived entirely from the consent of the parties who were interested at the time they were appointed. We do not believe, that the assent of the Judge added to their powers in the slightest degree; but it may be a security to the parties, to have the conduct of their agents under their supervision, and that of the tribunal, before which their case is pending. The fact, that the appointment of the plaintiffs is entered on the records of the Commercial Court, gives them no powers not conferred by the terms of the procuration, and the laws. The Judge has permitted the litigants before him to enter, on the minutes of his court, an agreement of their own, which for special purposes, vests a portion of their rights in others, to be exercised for the common benefit. No injury can result to the defendants from the appointment of the plaintiffs, unless it be that of being compelled to pay the debt they owe. The only question in which they are interested is, whether a payment made to the plaintiffs will protect them from further pursuit. We have no doubt but it will; and a judgment for or against them in this suit, will amply protect them, either against the claim of the United States, of the Bank of the United States, or of the persons claiming to be assignees of that institu-

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tion. Any defence which could be set up against this contract, against any one of those parties, may be offered in this action; and in fact we find the defendants availing themselves freely of their rights, and going without objection, most fully into matters and defences which go to invalidate the original contract entirely. They cannot complain of being deprived of a single point of their defence; the greatest latitude in the admission of testimony and argument, has been allowed; and if the defence shall not prove successful, it will not be because the parties have not been fully heard upon every point, both technical and legal, which they had to urge, aided by able counsel, but because of the inherent weakness of their case.

The counsel for the defendants have throughout their argument labored to keep the rights of the United States, of the Bank of the United States, and of its assignees separate and distinct; and have warred against them in detail, shielding themselves under each other, whenever their own defences proved too weak. They by turns advocate and attack the rights of their opponents, whenever it suits their own interests; and the burden of their complaint is, that all those who are interested in compelling them to pay their debt, have combined against them. The defence exhibits the skill of the generals, but is too feeble to resist the alliance. The counsel asks, who are the constituents of the plaintiffs, and what right of action can they separately maintain against the defendants? We think the constituents of the plaintiffs are all the parties who deputed their rights to them; and it is not competent for the defendants, to play off the rights of one of those parties against the others, and thus defeat all.

The defendants insist, that the substantial matters of their defence are pending in another suit, instituted by the United States against the Bank of the United States, in which they have been summoned as garnishees, and that two actions cannot be prosecuted against them, at the same time, for the same cause of action. The answer of the defendants in the attachment case referred to, does not exhibit the same grounds of defence as those now alleged. It avers that they are not indebted to the Bank of the United States, except on a contingent liability upon certain notes executed or endorsed by them; and denies generally that they

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are legally bound therefor. The deed of assignment and notice of it, and a seizure made by the United States, which its attorney admits has long since been abandoned, are interposed as reasons why they should not be condemned. The same grounds of defence are therefore not set up in the original attachment, as in this suit; but if they were, it would not make any difference, as that action has ceased to be prosecuted, although the record does not show whether or not it has been formally dismissed as to the defendants. If it has not, the judgment in this case will protect the defendants fully, and enable them to arrest it very speedily, should any attempt be made to prosecute it.

The third ground of defence is, that one George Beach has commenced a suit against the Bank of the United States by attachment, and has also cited the defendants as garnishees, and that the assignment, under which the plaintiffs claim, is fraudulent and without consideration. This attachment is interposed to protect the defendants from the claim of the plaintiffs; although, in their answer to it, they set up the assignment made to one of their constituents, and the seizure by another, as grounds of defence. George Beach does not complain before us in this case. On the contrary, we find from the record introduced in evidence by the defendants, that he has made the plaintiffs parties to his petition, and called on them to answer, as garnishees, what property or assets they have belonging to the Bank of the United States. The counsel for the defendants aver, that the attachment of Beach was anterior to the appointment of the plaintiffs as receivers or agents. In this they are mistaken; and it was doubtless a knowledge of this fact which induced Beach to make them parties to his suit. It is a well settled principle, that an attaching creditor has no higher or better rights to the property or assets attached than his debtor has, unless he can show some fraud or collusion, by which his rights are impaired. If liens or privileges exist on the property or money, they must be respected. 1 Robinson, 209, 443. Beach's attachment being subsequent to that of the United States, and to the arrangement made by all the parties interested at the time, we do not well see how he can avoid it; but as to him we shall express no opinion now. The defendants allege, that the United States cannot recover against them, be-

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cause they have no judgment against the Bank ; that the Bank cannot recover because it has made an assignment of the debt ; and that the assignees cannot recover because the United States has attached ; that all united cannot recover against them, because Beach has subsequently attached ; and that he cannot recover, in consequence of the previous proceedings, and the fact that they are advised by counsel that they are not bound to pay any thing. The position of the defendants, it would seem, is well fortified, but we do not deem it impregnable. This court, in 14 La. 511, and 19 La. 405, held, that a garnishee had no right to interfere with the merits of the case between the plaintiff and defendant. He is viewed as a stakeholder, bound to declare the truth, and if his declaration is controverted to support it, and to prevent any decision that will operate to his prejudice. The defendants then, have no right to inquire into the merits of the controversy between the conflicting parties. The simple question, as respects them, is, are they indebted ? And if so, can they safely pay to the plaintiffs ? The defendants aver that they are not legally bound to pay the notes they acknowledge to have signed ; and that the question cannot be inquired into until the controversy between all the other parties is decided. The United States must get a judgment against the Bank, before either can proceed to a liquidation of the demand of the latter on the defendants. This argument entirely mistakes the nature of the claim of the attaching creditor. It is not that the defendants are indebted to them, but simply a prayer that their debt against the Bank may be paid out of whatever may be owing by the defendants to it. Is the Bank then bound, whilst its claim is denied, to lie idle or remain powerless, until it can terminate its controversy with another adversary, and in the meantime give an opportunity to its debtor to squander his means, or give preferences to others, and this in a case, where that adversary joins in its prayer ?

The principle settled by this court in the case in 10 Martin's Reports, 609, 628, was, that the garnishee must be protected, and not put in a situation whereby he may be compelled to pay twice. Consequently, we ordered a stay of proceedings, until the result of another suit, in which he had been previously cited as a garnishee, could be ascertained. The court did not say that because

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there was another garnishment, there could not be a judgment in the case before them. In this case, if we thought there was any probability that the defendants would be compelled to pay twice, we should not hesitate in directing a stay of proceedings on the judgment, or directing the plaintiffs to give security to indemnify the defendants against any such consequences. The cases in 12 La. 16, and 13 La. 567, are based upon a state of facts very different from the present, and the same principles of law are not applicable. The latter case, if it has any application to the present, goes to show that Beach's attachment presents no obstacle to a judgment against the defendants; as it says, that the last attaching creditor can have no judgment against the garnishee, until the previous attachments are ascertained and paid. The attachment of Beach does not, in our opinion, present any obstacle to a judgment being rendered.

We come now to the defence most relied on by the counsel for the defendants: 1st, that the incorporation of the Bank of the United States by the Legislature of Pennsylvania, for the purpose of transacting banking business in the other States of the Union as well as within her own limits, and the exercise of that power in the State of Louisiana, is a usurpation of sovereignty on the part of the former State, a violation of the constitution of the United States, and an assumption of powers delegated by the States to the general Government.

2d. That these acts of the State of Pennsylvania, are an invasion of the sovereignty of this State; and would, if sanctioned, have the effect of yielding to the Legislature of Pennsylvania, the power of making laws co-extensive with our own Legislature.

3d. That the bank-charter is both a law and a contract: that as a law, it has no extra-territorial effect, and as a contract it can have no operation in this State.

4th. That the exercise of its corporate powers by the said Bank, within the limits of this State, is a violation of its laws, and in contravention of its well known policy.

The allegations contained in the first and second points would, if sustained, raise very grave and serious grounds of controversy, and would show, that the public authorities of this State had been very inattentive to the public acts of a powerful State of the con-

federacy, and remiss in preserving the dignity and character of our own. We have looked with some care, at the evidence in the record, and endeavored also to refresh our recollection as to the history of the legislation of Pennsylvania ; and are unable to discover any thing on the part of our sister State, that has the appearance of a usurpation of our rights as a State, or of a claim of power to legislate for our people. The power of the Legislature of Pennsylvania to charter the Bank of the United States, we believe is conceded ; at any rate we shall not now question it. The charter is one that is generally known ; and there is nothing in it which authorizes the corporation to exercise any power in this State in violation of our laws, or places it on a ground different from the corporations created by other States. We see no attempt to make laws for us, or to exercise any legislative authority within our limits.

That a law of the State of Pennsylvania has no extra-territorial effect, other than what is given to it by our own laws, is undeniable, and we suppose it is equally true, that the Legislature could prohibit a corporation created by another State from contracting in this ; but until some better evidence of such an intention is exhibited, we shall be careful how we enforce such a restriction.

The evidence in relation to this part of the case shows, that about the month of January, 1836, the Bank of the United States, chartered by Congress, in anticipation of the expiration of its charter, appointed an agent in New Orleans, where it had a branch and a large sum of money owing to it, for the purpose of liquidating its affairs. Shortly afterwards, the Legislature of Pennsylvania incorporated the institution, which succeeded to all the property and assets of the congressional Bank. The agent in New Orleans, was directed to invest the funds he received, in bills of exchange drawn upon merchants, or others in northern cities, and in foreign countries. He was also directed to throw into circulation as many as possible, of the notes of the institution he represented. The Legislature of our State, in the month of February, 1836, incorporated an institution known as the Merchants Bank of New Orleans, of which Willcox, one of the defendants, was a corporator. The stock of this institution was all taken by a few individuals, who about the month of September following, sold the

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whole of it to the Bank of the United States, for a bonus of more than a \$100,000 ; the defendant Willcox, and a few others, nominally holding a sufficiency of shares to qualify them to act as directors. Whatever capital the Merchants Bank ever had, was furnished by the Bank of the United States ; and shortly after the purchase by the latter, the former Bank went into operation, and immediately commenced acting as the known and public agent of its owners. In obedience to the will of its principal, it circulated very extensively the notes of the Bank in Philadelphia, bought bills of exchange, discounted notes, and contracted in every mode permitted by its charter. In consequence of its extensive operations, the debts owing to and from it, soon exceeded the limit fixed in the charter ; when the Bank of the United States, to enable itself to carry on its operations, appointed the President and Cashier of the Merchants Bank, their agents also, who kept their account in the bank, where it frequently amounted to millions of dollars.

This was, in fact, but keeping two accounts for the execution of the same mandate, and was intended to evade the restriction imposed. The fact of the agency was one of general notoriety ; and the annual reports made to the Legislature, state it in unequivocal terms. The Bank of the United States had a similar agent at Natchez, and a personal agency in Mobile, with whom the Merchants Bank was directed to correspond. Property was purchased for the purpose of erecting a suitable building for the transaction of business. In a word, the Merchants Bank was as much a branch of the Bank of the United States, as the branch of the National Bank, which had ceased to exist, ever was. For several years previous to the time when the Merchants Bank was incorporated, at the same session, and subsequently, the Legislature created numerous corporations, by the express provisions of some whose charters it was evident, that it intended them to contract and operate in other States of the Union ; for, they were authorized to raise their capitals by the sale of the bonds of the State, or otherwise to borrow money in foreign countries. With the agents just mentioned, the defendants contracted ; but whether the obligation now sued on, was in renewal of a previous one, is not shown. We, therefore, regard it as a primary contract. Under these cir-

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cumstances, we are called on to say that this contract is not obligatory, is opposed to public policy, and therefore void.

The defendants' counsel contend, that the Bank of the United States had no right to make a contract in this State, or to exercise such powers as it did ; wherefore, all its contracts are null. They argue, that the Bank could not migrate or establish a branch in this State, and that the comity extended upon the principles of national law, ought not to be extended to this corporation ; so indefensible has been its conduct and policy. We admit fully the power of the Legislature to pass an act restraining foreign corporations from contracting in this State ; but, until such an act is passed, we cannot, upon any principle of justice and reciprocity, refuse to enforce a contract so made. In every State where the courts have annulled such contracts, there is a restraining statute ; and, in those States where no restraining statute exists, the contracts have been enforced. 7 Wend. 276. 2 Rand. 465. 8 Dana's Ky. Rep. 114. The capacity of foreign corporations to sue, has been long and well established. Angel on Corporations, 210. 7 Mart. 31. 2 Rand. 465. 17 Wend. 170. The capacity of foreign corporations to contract is amply sustained by authority ; and, since the decision of the Supreme Court of the United States, in the cases of *The Bank of Augusta v. Earle*, *The Bank of the United States v. Primrose*, and *The Carrollton Bank v. Earle*, 13 Peters, 519, we supposed there was not a doubt on the subject. The counsel for the defendants have endeavored to weaken the force of these decisions, by quoting the arguments of the counsel for the plaintiffs, and the admissions they made ; but they have not succeeded in doing so. The judgment of the court is conclusive upon this part of the case, and the counsel have not been able to meet the argument of the Chief Justice on it. He says, at pages 598-599 of the above volume : " The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange ; and, consequently, gives it the power to purchase foreign bills as well as inland ; in other words, to purchase bills payable in another State. The power thus given, clothed the corporation with the right to make contracts out of the State, in so far as Georgia could confer it ; for, whenever it purchased a foreign bill, and forwarded it to an agent to present for accep-

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tance, if it was honored by the drawee, the contract of acceptance was necessarily made in another State ; and the general power to purchase bills without any restriction as to place, by its fair and natural import, authorized the bank to make such purchases wherever it was found most convenient and profitable to the institution ; and, also, to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter ; and was sanctioned by the law of Georgia creating the corporation, so far as that State could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction.

" But, it has been urged in argument, that, notwithstanding the powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the State ; that the laws of a state can have no extra-territorial operation ; and that, as a corporation is the mere creature of a law of the State, it can have no existence beyond the limits in which that law operates ; and that it must necessarily be incapable of making a contract in another place.

" It is very true, that a corporation can have no legal existence, out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by the force of law ; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that State only, yet it does not, by any means, follow that its existence there will not be recognized in other places ; and its residence in one State creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible ; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of *The United States v. Amedy*, 11 Wheaton, 412, and in *Beaston v. The Farmers Bank of Delaware*, 12 Peters, 135. Now, natural persons, through the intervention of agents are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made ; and nobody has ever doubted

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the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside ; provided such contracts are permitted to be made by them, by the laws of the place.

"The corporation must, no doubt show, that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient, that its existence as an artificial person, in the State of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place ; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

"Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised ; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed, whether, by the comity of nations, and between those States, the corporations of one State are permitted to make contracts in another. It is needless to enumerate here the instances in which by the general practice of civilized countries, the laws of the one, will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contract made in a foreign country are familiar examples ; and courts of justice have always expounded and executed them, according to the laws of the place in which they were made ; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered ; and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong ; that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's *Conflict of Laws*, 37,

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'That in the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided.'

"Adopting as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another State. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts; since the case of *Henriquez v. The Dutch West India Company*, decided in 1729. 2 L. Raymond, 1532. And it is a matter of history, which this court are bound to notice, that corporations created in this country, have been in the open practice, for many years past of making contracts in England of various kinds, and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts, by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract, by which an American corporation had borrowed money in England; yet if the contracts of corporations made out of the State by which they were created, are void, even contracts of that description could not be enforced.

"It has, however, been supposed that the rules of comity between foreign nations do not apply to the States of this Union; that they extend to one another no other rights than those which are given by the constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States, as a part

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of its jurisprudence, or that it acknowledges any rights but those which are secured by the constitution of the United States. The court think otherwise. The intimate union of these States, as members of the same great political family, the deep and vital interests which bind them so closely together should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when, (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these States? They are sovereign States; and the history of the past and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one State, by a corporation created in another. The numerous banks established by different States, are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking, have been established in other States, and suffered to make contracts without any objection on the part of the State authorities. These usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced in by the States, that the court cannot overlook them, when a question like the one before us is under consideration. The silence of the State authorities, while these events are passing before them, show their assent to the ordinary laws of comity, which permit a corporation to make contracts in another State. But we are not left to infer it merely from the general usages of trade, and the silent acquiescence of the States. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion, that it has been decided in many of the State courts, we believe in all of them where the question has arisen, that a corporation of one State may sue in the courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives

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from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power; why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty—where the last mentioned power does not come in conflict with the interest or policy of the State? There is certainly nothing in the nature and character of a corporation, which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself, to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised, if the former were denied."

The year subsequent to the decision of the case from which we have quoted at so much length, the question again arose, and Mr. Justice Thompson, who delivered the opinion of the court, said: "The rights and powers of a corporation were very fully examined and illustrated by this court, at the last term, in the case of *The Bank of Augusta v. Earle*, 13 Peters, 584; in which case, and in various other cases decided in this court, a corporation is considered an artificial being, existing only in contemplation of law: and, being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. Corporations created by statute must depend for their powers and mode of exercising them, upon the true construction of the statute. A corporation can have no legal existence out of the sovereignty by which it is created; as it exists only in contemplation of law, and by force of the law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation; and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not follow that its ex-

istence there will not be recognized in other places ; and its residence in one state creates no insuperable objection to its power of contracting in another. The corporation must show that the law of its creation gave it authority to make such contracts. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence, as an artificial person, in the state of its creation, is acknowledged and recognized by the state or nation where the dealing takes place ; and that it is permitted, by the laws of that place, to exercise there the powers with which it is endowed. Every power, however, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised ; and a corporation can make no valid contract without the sanction, express or implied, of such sovereignty, unless a case should be presented in which a right claimed by the corporation, should appear to be secured by the constitution of the United States." 14 Peters, 129.

The reasoning and decision of the supreme tribunal of the nation, completely covers the case before us, and leaves us but the duty of applying the principles to it.

The charter of the Bank of the United States, as granted by the State of Pennsylvania, gives it the power to lend money and take security for its payment ; it therefore had a right to make the contract in question in this State.

Taking the legislation of this State as the true exponent of its public policy, we see nothing in it adverse to foreign corporations. If any description of corporation was more favored than another, at the date of this contract, it was banking corporations. Our statute book is filled with charters, the objects of which were to entice capital and bank paper from all quarters ; and it is now too late, to endeavor to repudiate the debts contracted with those, our people were then so anxious to deal with. At the present time, so far from the Legislature refusing to recognize the agents of foreign corporations, we see them authorizing their location in the State, by making them objects of taxation.

The defendants have endeavored to convince us, that articles

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423 and 437 of the Civil Code and the act of the Legislature in relation to anonymous partnerships, are laws which forbid corporations created by other States, from contracting in this. B. & C. Dig. 614, sect. 6. They have not succeeded in doing so. The act of the Legislature relied on, does not, in our opinion, apply to corporations at all. Its purpose is to limit the responsibility of partners in private companies or partnerships, which any number of individuals may choose to form. The articles of the code are equally clear. The one first relied on is directory only, and declares that corporations, (meaning those in the State) must be created by the Legislature. It indicates the body that is to give them existence. Article 537 provides, that "corporations unauthorized by law or an act of the Legislature, enjoy no public character, and cannot appear in a court of justice, &c." It cannot be denied, we suppose, that the Bank of the United States is or was a corporation authorized by law in the State of Pennsylvania. The article plainly alludes to other corporations than those created by our own Legislature, otherwise it would not have been necessary to use the alternative expressions, which we see in it.

The last ground of defence is, that the contract is usurious. It is stipulated that the notes sued on, shall bear interest at ten per cent per annum until paid. This, the defendants aver, is a higher rate of interest than the Bank can, by its charter, receive. The words of the charter are, "the rate of discount at which loans may be made by said Bank within this commonwealth, shall not exceed one-half of one per centum for thirty days." The defendants insist, that this clause prohibits the Bank from contracting for a higher rate of interest elsewhere. We do not think so. If the Bank has the power to contract in this State, of which we have no doubt, it is competent for it to contract in conformity to the laws of the State. We are not prepared to say, that all the disabilities or restrictions, which the laws of a country impose on an individual or corporation in relation to contracts, follow them into our State, and render them incapable of contracting according to our laws. The Judge of the Commercial Court has reduced the rate of interest to six per cent. In this we think there is error, and as the plaintiffs have asked us to amend the judg-

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ment by increasing the rate of interest to that specified in the contract, it will be so ordered.*

The judgment of the Commercial Court is amended by allowing the plaintiffs to recover interest at ten per centum per annum on the sum claimed, from the 17th of June in the year 1837, until paid, and in all other respects, it is affirmed, with costs.

T. Slidell, B. Peyton, J. W. Smith and Grymes for the plaintiffs.

Josephs, G. Strawbridge, and Eustis, for the appellants.

* The subjoined opinions were submitted to the court by the counsel for the plaintiffs in this case.

OPINION OF HORACE BINNEY, ESQ.

I have considered the question submitted by the Bank of the United States, in regard to the limitation contained in the 6th article of the 4th section of the charter granted by the State of Pennsylvania.

The question is a new one. It is not without difficulty; and as a great deal may depend on it, it would be very agreeable to me, if the views hereafter presented were submitted to Mr. Serjeant, before the Bank shall act upon them. I, however, proceed to give my opinion, leaving the disposition of it to the Bank.

The first paragraph of the 6th article ordains, that "the rate of discount at which loans may be made by the said Bank *within this commonwealth*, shall not exceed one-half of one per centum for thirty days." The question submitted to me is, whether it is lawful for the Bank to make a contract in another State, reserving a higher rate of interest, if the laws of that State authorize a higher rate.

The literal meaning of this clause is free from ambiguity. The Bank of the United States is prohibited from making a contract of loan, *within the State of Pennsylvania*, upon which a higher rate of discount is taken, than that which the article prescribes. The fair and natural meaning is as clear as the literal. The prohibition is limited, in its operation, to discount upon loans *within the State*. Nothing in the charter prohibits such contracts elsewhere. They are left to the operation of the general powers of the Bank, to the laws of the place where such contracts are made, and to general principles. If the Bank can lawfully make a contract in a foreign State, such a contract is not within the fair and natural meaning of the 6th article. It is proper to remark, that the language of this article differs from the corresponding provision of some other bank charters granted by the State of Pennsylvania. In the general Bank Act of 25th March, 1824, the enactment is as follows: "The rate of discount, at which loans may be made by any of the said Banks, shall not ex-

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ceed one-half of one per centum for thirty days." In the charter of the Bank of Pennsylvania, the language is: "neither shall the said corporation take more than at the rate of half per centum for thirty days." In the charters of the Bank of Pennsylvania, and the Farmers and Mechanics Bank, it is the same. The rate of discount by Banks incorporated by the State of Pennsylvania, is, in nearly all their charters, restrained by language of the same import. It is not, however, universally so. The Bank of North America is not, as far as I can find, placed under any other restraint in regard to interest, than is imposed by a proviso, "that nothing herein before contained shall be construed to authorize the said corporation to exercise any power in *this state* repugnant to the laws or constitution thereof." As the law of the State prohibits more than six per cent interest upon loans made within it, it may be inferred, that this proviso restrains the Bank from charging a higher rate of interest upon such loans. It consequently may be inferred, that the loans of that Bank elsewhere, have been left as the loans of the Bank of the United States are left, notwithstanding the article in question.

Upon the effect of the restraining clause in the charters of all the other Banks, except that of the Bank of the United States, it is, however, unnecessary to express any opinion. In all, but that of the Bank of North America, it may have been intended to restrain the rate of discount upon their loans, any where and every where, or such may be the legal effect of the language. I do not mean to give any opinion upon the point. In the case of the Bank of North America, which was instituted to act by the aid of charters in different States, the State of Pennsylvania may have intended only to protect her own citizens within her own jurisdiction; and, therefore, she may have used a language which contains no express restraint upon any of the contracts of the Bank elsewhere, leaving them to the law of the place where they might happen to be made. But, be this as it may, in regard to the Bank of the United States, the words "*within this commonwealth*," are not only new words in regulation of this subject, and therefore fairly inferring a new intention, but their plain and natural meaning, to confine the restraint to loans *within* the State, is so clear, that it will be in palpable violation of the article to extend the restraint to contracts made elsewhere.

The history of the day is so recent, that every one in Pennsylvania must know, that it was expected the Bank of the United States would endeavor to loan a part of her large capital in other States. The capital of the former Bank of the United States, which it was the design of the Pennsylvania charter to draw from the former corporation into the new one, was itself, in a great degree, composed of such loans; and from this state of cotemporary circumstances, as well as from the language of the article, I entertain the opinion, that the commonwealth of Pennsylvania intended to confine the Bank to a certain rate of discount upon loans, only *within* the State, and did not intend to restrain the rate upon loans made out of the State: that is to say, the State did not intend to restrain the corporation in this respect generally, but only lo-

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cally. The case then presents legislation of the following kind : a Bank of Discount, incorporated by the State of Pennsylvania, is expressly restrained from charging more than a certain rate of discount upon loans *within* the commonwealth. The charter contains no provision in regard to loans elsewhere. If they are lawful at all, that is to say, if they are within the competency of the Bank, they are left without any restraint by the charter. What is the influence of such legislation upon contracts of loan made by the Bank at a higher rate of interest, in States where a higher rate is authorized by law, and where the Bank is not prohibited from entering into a contract of loan ?

It is particularly worthy of remark, that the Bank of the United States does not derive her power to charge interest upon her loans from the 6th article of her charter. The article is a restraint, and not a grant of power. In terms, it is only a restraint, and gives no power whatever, unless it may be the power of charging, by way of discount, six per centum on 360 days, or at that rate, contrary to what is thought to be the general rule under the usury laws. Where then does the Bank obtain the power to charge any discount or interest at all ? The power is, I apprehend, derived from her creation as a Bank of loan and discount. Her power is the general power, which every one has who possesses the means, and the capacity to loan. The Bank has this general power by her constitution, but within the State of Pennsylvania, its exercise is restrained by the 6th article. Neither this article, nor any other part of the charter, is a restraint upon the exercise of this power elsewhere. As a corporation, the Bank possesses the power generally ; and precisely as in the case of a natural person residing in the State of Pennsylvania, its power to lend its moneys upon interest to every body, and in every place, not violating the law of the place where the loan is made, nor the charter in making it *there*.

The situation of the Bank in this respect, I take then to be as follows :— She may make contracts of loan any where, the same not being contrary to the law of the place, and the exercise of the power must be subject to the restraints of that law, as it regards the rate of discount or interest, and so of every thing else. It must also be subject to the restraints of her charter whenever they apply. But the restraints of the 6th article in regard to the rate of discount apply only to loans *within* the State of Pennsylvania. Loans out of the State are not subject to this restraint, and are restrained only as the law of the place, in this respect, may restrain them. I consider this view to be in conformity with all that was settled by the Supreme Court of the United States, in the case of *The Bank of the United States v. Primrose*, 13 Peters, 519. To hold, that the 6th article is a general restraint upon the power wherever exercised, is to disregard the terms in which the restraint is imposed. It is a restraint in one particular, operating in one place only, and out of that place the general power has, upon principles of comity, all the effect which the laws of that place permit. I understand the position of those who deny the right of the Bank to loan in foreign places at more than six per

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cent, is this: That a corporation cannot exercise a greater power anywhere, than it can exercise in the place where it is incorporated; or, that comity does not require a foreign place to permit or respect the exercise of a greater power. The Bank of the United States, it is said, cannot, in the State where it is incorporated, discount at a higher rate than half per cent for thirty days, and therefore it cannot do so anywhere. If this position is carefully examined, it will not be found so imposing as at first sight it may appear. Comity does not require a foreign State to permit either a corporation, or a natural person to exercise any power within its jurisdiction, in opposition to its own laws; but if its own laws do not prevent, it is the part of comity to respect and aid the exercise of every power which a corporation, without violating its charter, can exercise out of the place in which it is incorporated. The duty of comity is, therefore, co-extensive with the power of the corporation, and the only part of the objection to which it is necessary to advert, is that which regards the power of the corporation. A corporation can do nothing out of the State in which it is chartered, or within it either, contrary to its charter; if its power is limited generally or universally to certain acts, as to purchase and sell bills of exchange, or to effect insurances against sea risks, or fire, or the like—it can perform no other acts any where. The whole capacity of the corporation is, by the law of its being, confined to such acts, and of course it is so confined every where. Comity is not called upon to permit a corporation to exercise a power in another State, which, by the law of its creation, it is not competent to perform at all. As to acts of a different kind, the corporation has no legal capacity any where, and to permit the corporation to perform them in another State, would be to create a corporation with new powers, and not to assist by comity the exercise of powers plainly granted to it. In such a case it may be conceded, that a corporation cannot exercise *without* the State in which it is created, a greater power than it can exercise *within* it. In other words a corporation cannot exercise more power any where than its charter gives to it. But a general power may be given to a corporation to perform certain acts, and there may be a restraint by the charter upon the performance of them at all, in a certain place, or except with a certain modification. In such a case the power is general, and the restraint is local or modal. Within the district excepted, the restraint operates to curtail the general power. Out of the district, the power exists without restraint. How stands such a case as to the operation of comity upon the general power in a foreign State, and out of the excepted district? If the comity of the foreign State respects the exercise of the power, undiminished by the restraint, it does no more than sanction what the charter authorizes. If it does not respect it, in consequence of the omission by the corporation to observe the local restraint, then it does not respect the charter authority, nor the intention of the State that created it. It treats the local restraint as an universal one, and so extends the exception as to make it a general rule. The principle of such a construction, it is not easy to comprehend. I cannot assent to it, and it is

not difficult to suggest cases to show, that its operation must be both inconvenient and unreasonable. Take the case, for instance, of power given by a charter to a State Bank, to establish a branch any where but in the State, which grants the charter. Here the power would be general, and the restraint local. Could it be maintained, that because the Bank could not establish a branch within its own State, therefore it could not establish one in any other State? Yet this consequence would follow, if there be such a principle, that a corporation cannot exercise a power, out of its own State, which it cannot exercise within it.

Take another case: that a Bank in Pennsylvania is chartered, without any express restraint in the charter as to the rate of discount. If the general usury law of Pennsylvania extends to corporations, the Bank is, by that law, restrained from taking a higher rate of interest than six per cent within the State, and if there is such a principle, as that a corporation cannot exercise a power out of its own State, which it cannot exercise within it; then it follows, that in no case can a Bank make a contract for a higher rate of interest abroad, than the general law of its own State permits; and it would seem also to follow, that all the restraints of its own State laws follow it wherever it acts, and must be enforced and observed in a foreign State, however different from the laws of that State. Take a third case: that in the charter of the Bank of the United States, there had been added, to the restraint of the 8th article, a proviso that the restraint should not operate in the case of loans made out of the State. How would the matter stand then? It would then be indisputable that the State intended to leave the general power of the Bank unaffected by the restraint, and subject, in this respect only, to the restraint of the foreign law. Could it be contended that the Bank was not competent, by its charter, to make a loan in a foreign place at a higher rate of interest, if the law of that place permitted it. And if the power of the Bank, and the permission of the law of a foreign place were clear, could it be contended that there was still a principle that made the foreign contract invalid, because it would have been invalid at home? I think not. And yet what is the difference between such a case and the very case in question. If there is any, it is merely in the greater clearness of the intention of the Legislature of Pennsylvania, not to annex the restraint to loans made out of the State. But in my apprehension, that intention is abundantly clear from the language of the article as it stands without any such proviso. If the whole question be, what is the intention of the Legislature of Pennsylvania—then the principle suggested disappears, and the whole inquiry is the common one—what is the power given by the charter in regard to loans out of the State of Pennsylvania?

I find myself unable to assent to the proposition that a corporation cannot, in any case, exercise a more unrestrained power anywhere, than it can in the State where it is incorporated. There is no general principle to this effect. The power of the corporation depends upon the charter. The charter may expressly give power to be exercised in foreign places, without any restraint, except so

Frazier and another, Receivers, &c. v. Willcox and another.

far as the laws of the place prevent, and may nevertheless impose restraints upon the exercise of the power at home. It may give such a power by implication, while it restrains the exercise of the power within its own jurisdiction as it sees fit. The question, in every case, is a question of the interpretation of the charter—whether the power exists generally, and is only locally restrained—or whether there is such a universal restraint upon the power wherever exercised, as makes it the case of a power abridged or curtailed in its very creation. While I see no inconvenience in admitting, that if the power of a corporation does not, under any circumstances, extend to the valid performance of a certain act, the corporation cannot perform that act in a foreign State, whatever may be its laws; yet, if the general powers of the corporation extend to the act, and the charter imposes a restraint upon its exercise within certain limits, I cannot admit that, because the restraint operates within the jurisdiction of the incorporating power, there is any principle of law, that annexes the restraint to acts performed in a place out of those limits, though the law of that place knows of no such restraint.

I do not think it necessary to lay any stress upon the words of the 6th article as comprehending cases of discount and loans of money, and not contracts generally, though certainly such is its language. Contracts of the Bank, by which new promises and securities are taken for former loans, or for bills protested and the like, are not discounts nor loans, and the article does not apply to them. The general law governs such cases where they occur; but even in regard to loans, properly speaking, I am of opinion, that out of the State of Pennsylvania, the Bank of the United States may make them at any rate of interest not prohibited by the law of the place.

HORACE BINNEY.

Philadelphia, May 27th, 1840.

MR. SERGEANT'S OPINION.

Having examined the above opinion of Mr. Binney, and considered the subject, I fully concur with him.

JOHN SERGEANT.

Washington, June 2, 1840.

Hubert v. Turnbull; &c.

In the cases of *Louis Amazon Hubert v. Walter Turnbull*, from the District Court of Pointe Coupée; of *Nathaniel Farman v. Joseph Barrau; Sumpter Turner and another v. M. Murphy and another, George W. Taylor and another v. Milliet and others, George W. Taylor and another v. François Pralon and Alfred J. Perkins v. Marie V. A. Puchen*, from the Commercial Court of New Orleans, the judgments of the lower courts were affirmed on appeal, in New Orleans, with damages, during the period embraced by this volume.

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ACTION.

See PLEADING.

ACT SOUS SEIGN PRIVÉ.

The decision in *Doubrere v. Grillier's Syndic*, 2 Mart. N. S. 171, that an act *sous seign privé* will have effect against third persons from its date, if possession accompanied or followed its execution, was made under the Code of 1808, and is inconsistent with the provisions of art. 2417 of the present Civil Code. *Brassac v. Ducros*, 335.

ADMINISTRATOR.

See SUCCESSIONS.

ADMISSION.

See EVIDENCE, VI. PLEADING, V.

AGENCY.

1. In an action for the price of certain timber, defendant having alleged that he purchased it from a third person who had it in possession, plaintiff offered the evidence of a witness, taken under a commission, who deposed, that, being entrusted with the timber by plaintiff, he had, without authority, delivered it to the person from whom defendant obtained it. The admission of the evidence was opposed on the ground that the witness, who was the agent of the plaintiff, had a direct interest in the result, as he would be responsible to the latter, in the event of his losing the suit, in consequence of having exceeded his authority. *Held*, that the evidence was admissible.

Marks v. Landry, 31.

2. The provision of art. 2976 of the Civil Code that "the attorney is answer-

able for the person substituted by him to manage in his stead, if the procuration do not empower him to substitute," implies that he is not answerable if it did so empower him ; and the power is implied whenever the principal knew that the mandatary would be obliged to act by a substitute,

Hum v. Union Bank of Louisiana, 109.

3. Bills of exchange and promissory notes are generally placed with a bank for collection, with a notary for protest, and with an attorney to be put in suit. In such cases where the bank, the notary, or the attorney is *omni exceptione major*, an agent who may have received the note for collection, will not be responsible for their neglect or misconduct. *Ib.*

4. A banker who pays a forged check, must support the loss.

Laborde v. The Consolidated Association of Louisiana, 190.

5. Notice of protest served on an attorney in fact is sufficient, though the procuration does not confer specially the power to receive such notices, if it gives general powers to transact the business of the principal, he being abroad. To transmit such notice to the latter at a distant place, might endanger his recourse against previous endorsers, or the maker. *Aliter*, where the power is a limited one, conferring only certain special enumerated powers. In such a case, the procuration cannot be extended beyond what is expressed therein ; and the power to receive a notice of protest is not necessarily included in that of endorsing.

De Lizardi v. Pouverin, 393.

6. A debtor of plaintiffs, both being non-residents, consigned a lot of cotton to defendants who were commission merchants in New Orleans, for sale. In the bill of lading, which was filled up by one of the latter, it was mentioned, that "the proceeds shall be subject to the order of the plaintiffs." Defendants having sold the cotton, attached the proceeds in their own hands for a debt due to them by the consignor. *Held*, that defendants having received the cotton in virtue of the bill of lading, and sold it, were bound to carry out their agency, and to account to plaintiffs for the proceeds.

Bank of Port Gibson v. Burke, 440.

7. Parties interested in a debt or other property, may appoint agents to take care of their interest, and vest them with all necessary powers. *C. C.* 2951, *et seq.* ; and an action may be maintained in the name of the agent, as well as in that of the principal, if power to that effect be given.

Frazier v. Willcox, 517.

8. The judges of the inferior courts cannot, of their own accord, appoint receivers for the purpose of collecting or keeping funds, or evidences of debt which may be the subject of litigation before them. Such appointments can be made only with the consent of all the parties interested, and the assent of the judge can add nothing to the powers of the persons so appointed. *Ib.*

AMENDMENT.

See APPEAL, 21. PLEADING, 5.

ANSWER.

See PLEADING, III.

APPEAL.

I. *Powers of the Supreme Court for enforcing its Appellate Jurisdiction.*

II. *From what Judgments an Appeal will lie.*

III. *Period within which an Appeal will lie.*

IV. *Citation of Appeal.*

V. *Statement of Facts and Record of Appeal.*

I. *Powers of the Supreme Court for enforcing its Appellate Jurisdiction.*

1. The power to issue writs of prohibition was conferred on the Supreme Court merely as a means of enabling it to exercise its appellate jurisdiction. Like the writ of mandamus, a prohibition may be issued even where a party has other means of redress, if the slowness of ordinary legal proceedings be likely to produce such immediate injury as ought to be prevented.

State v. The Judges of the Commercial Court of New Orleans, 48.

2. The writ of mandamus is given to enable the Supreme Court to command inferior courts to act where delay would cause damage and injustice; and the writ of prohibition to restrain them, where their acting without authority would produce similar results. *Ib.*
3. The writ of prohibition is an extraordinary one, and should be issued only in cases of great necessity, clearly shown, and where the party has applied, in vain, to the inferior tribunals for relief. *Ib.*

II. *From what Judgments an Appeal will lie.*

4. Appeal by intervenors, on whose claims no judgment had been pronounced, from a judgment overruling an exception to answering taken by defendant on the ground of the want of proper parties, and ordering a judgment by default to be entered against him. *Held*, that the intervention not having been acted upon, and no final judgment, having been rendered against the defendant, the appeal must be dismissed. *Whittemore v. Watts*, 47.
5. By article 567 of the Code of Practice, a party against whom a judgment has been rendered cannot appeal, if he have acquiesced therein, by voluntarily executing it, [*Landry v. Connely*, 127;] and the same rule will be extended to one, who, having obtained a judgment, has carried it into execution. *State v. Judge of the Parish Court of New Orleans*, 85.
6. A rule on the mortgagee, taken, after an order of seizure and sale had been executed, by one who had been appointed curator *ad hoc* to represent the third possessor of the mortgaged property, to show cause why a certain sum, under the jurisdiction of the Supreme Court, should not be allowed as

- a fee for his services, is not such an incident to the principal action, as to make the latter the basis of an appeal, to be used only for the correction of errors committed in the adjustment of such incidental matters. Though arising out of the original action, the demand in the rule is entirely distinct from it, and, being under three hundred dollars, is not appealable. *Ib.*
7. No appeal will lie from an action instituted against several defendants on an instrument by which they are bound severally, as sureties, for a fixed sum, where the amount claimed from each is under three hundred dollars, though the whole claim exceed that sum. The defendants cannot give jurisdiction by joining in one appeal, where they would have no right to be heard separately. *Merritt v. Hozey*, 319.
8. No appeal will lie to the Supreme Court from any decision of the Presiding Judge of the City Court of New Orleans, in a case originally instituted before an Associate Judge of that court. *Barthe v. Bernard*, 377.
9. No appeal will lie, under ordinary circumstances, in favor of the syndic of the creditors of an insolvent, from an order to produce his bank book.
Perrault v. His Creditors, 396.

III. Period within which an appeal will lie.

10. After a suspensive appeal, and execution issued on account of the insufficiency of the security, a devolutive appeal may be obtained, after the ten days have elapsed, without any order formally setting aside the former, which becomes inoperative by the mere failure of the party to comply with the terms on which it was granted. *Meeker v. Galpin*, 259.

IV. Citation of Appeal.

11. Where by the consent of counsel, an order has been entered, remanding the record for the purpose of being perfected, coupled with an agreement that the whole case shall be submitted on written arguments, within a certain time, the appellee will be considered as having renounced any right to move for a dismissal of the appeal on the ground of want of citation.
Escurieux v. Chapduc—Application for a Re-hearing, 326.
12. Appeal dismissed, for want of proof of service of citation of appeal.
Dolliole v. Azéma, 424.

V. Statement of Facts and Record of Appeal.

13. One who excepts to the opinion of an inferior court, must place on the record whatever may be necessary to enable the Supreme Court to come to a decision. *Kees v. Lefebvre*, 15.
14. Since the act of 20th March, 1839, (sect. 19,) amending the Code of Practice, no appeal will be dismissed on the ground that the transcript was not filed on the return day, where such transcript was filed before the motion to dismiss. *Duperron v. Van Wickle*, 39.
15. Where the record from its incompleteness, will not enable the appellate court to examine the case on its merits, and no assignment of errors has

been filed within ten days after bringing up the record, as required by art 897 of the Code of Practice, the appeal must be dismissed.

Segur v. Hill, 147.

16. Evidence not produced on the trial below, cannot be brought before the Supreme Court on appeal. *Smelser v. Williams*, 152.
17. Suspensive appeal, but no statement of facts, though the evidence was no reduced to writing, and appeal dismissed for insufficiency of the security. A devolutive appeal having been taken after the lapse of the time for a suspensive appeal, a statement of facts was made out by the court according to law. On a motion to dismiss, on the ground that the statement was made too late: *Held*, that the statement was made in time, and that such statement may be made at any time after judgment signed, provided it be before the appeal, (C. P. 602,) which might have been taken at any time within a year, from the date of the judgment. *Meeker v. Galpin*, 259.
18. In the absence of proof to the contrary, it will be presumed that the judgment of an inferior court was rendered on the necessary evidence; but where the record itself shows that a judgment by default could not have been rendered on such evidence as the law requires to make it final, the case will be remanded. *Escurieux v. Chapduc*, 323.
19. Where on an appeal from a judgment by default confirmed below, the clerk certifies the record as containing a true copy of *all the documents on file* and proceedings had, but does not show that any other document, which may have been produced, was not filed, and it appears from the transcript that without producing another document, the judgment could not have been legally confirmed, the judgment must be set aside. *Per Curiam*. If no other document was produced, the evidence was insufficient; if produced, it was the plaintiff's duty to have placed it on file. C. P. 585. *Ib.*
20. Where the record contains no statement of facts, bill of exceptions, or assignment of errors, and it appears from a certificate of the clerk on the return of a *certiorari*, that the evidence of a witness examined below, not taken down in writing, cannot be included in the record, the appeal must be dismissed. *Clark v. Laidlaw*, 380.
21. A certificate from the Judge of an inferior court, from which an appeal has been taken, will be received at any time to show error in the original certificate appended by him to the transcript of the record; and, on a proper showing, the clerk of the lower court may also be allowed to amend his certificate. *Lafonta v. McAllister*, 390.
22. Where the record is not certified as containing all the evidence introduced on the trial, and there is no statement of facts, bill of exceptions, or assignment of error, apparent on the record, the appeal must be dismissed.

Corlis v. Tyler, 443.

ASSIGNEE.

See BANKRUPTCY, 4.

ATTACHMENT.

1. In a question as to the sufficiency of the surety on an attachment bond, his actual means, and not the amount for which, from the nature of the case, he may be ultimately liable, must be looked to. *C. C. 3011, 3012, 3033.*

Lard v. Strother, 95.

2. Where an attachment has been set aside on account of the insufficiency of the bond, the plaintiff may take out another attachment without filing a new petition, or having paid the costs of the first. Art. 492 of the Code of Practice does not apply to such a case. *Harrison v. Poole, 193.*

3. Action on a draft in favor of plaintiff, drawn by defendant on a person with whom he was connected as a partner in planting. This partner being much in debt, had conveyed to the intervenor, by a deed of trust, executed in another State, his entire interest in the plantation and slaves, for the purpose of applying the crops to the payment of his debts. The intervenor was in possession under the deed, with the knowledge of defendant, though the latter was not a party to the instrument. Plaintiff having attached a part of the crop made by the intervenor on the plantation: *Held*, that the latter cannot be deprived by the creditors of either partner, of any part of the crop, until all the expenses of his management of the plantation have been reimbursed, and that the plaintiff could attach in the hands of the intervenor, only the balance due to defendant on a settlement of accounts.

Endicott v. Scott, 265.

4. The property of the principal cannot be seized under execution by a creditor, even to the extent of the consignee's privilege; the creditor of the consignee in such a case, must attach or seize the claim of his debtor in the hands of the consignor. *Montgomery v. Brander, 400.*

5. A debtor of plaintiffs, both being non-residents, consigned a lot of cotton to defendants who were commission merchants in New Orleans, for sale. In the bill of lading, which was filled up by one of the latter, it was mentioned, that "the proceeds shall be subject to the order of the plaintiffs." Defendants having sold the cotton, attached the proceeds in their own hands for a debt due to them by the consignor. *Held*, that defendants having received the cotton in virtue of the bill of lading, and sold it, were bound to carry out their agency, and to account to plaintiffs for the proceeds.

Bank of Port Gibson v. Burke, 440.

6. An attaching creditor can have no higher or better right to the property attached than his debtor, unless he can show some fraud or collusion by which his rights have been impaired. Liens or privileges existing on the property must be respected. *Frazier v. Willcox, 517.*

7. A garnishee has no right to interfere in the merits of the case as between the plaintiff and defendant. He is to be viewed as a stakeholder, bound to disclose the truth. If his declarations be controverted, he may support them, and may oppose any decision that will operate to his prejudice. As to him, the questions are, is he indebted, and whether he can safely pay to the plaintiff. Where there is any doubt as to the validity of the payment,

a stay of proceedings will be ordered, or security to indemnify the garnishee will be required. *Ib.*

ATTORNEY AT LAW.

It will not be presumed that a member of the bar would commence any suit without authority; nor will the production of his powers be required unless on a suggestion supported by affidavit, that he acted without authority. The affidavit should state facts or circumstances rendering it probable that the action was unauthorized. It will not be enough to swear to a mere impression or belief. *Bonnefoy v. Landry*, 23.

ATTORNEY IN FACT.

See AGENCY.

BAIL.

On a rule against the sureties on a bail bond, (taken under the act of 28 March, 1840, supplementary to another act approved on the same day,) conditioned that the principal shall not depart from the state for the term of three months without leave of court, or, in case of such departure without leave, that the sureties shall pay the amount for which definitive judgment may be rendered, the plaintiff must show that the principal has left the state within the three months in violation of the bond, or he cannot recover.

Phillips v. Hawkins, 218.

BANKS.

1. A banker who pays a forged check, must support the loss.

Laborde v. The Consolidated Association of Louisiana, 190.

2. The Merchants Bank of New Orleans, having surrendered its charter, under the act of 14th March, 1842, ch. 98, providing for the liquidation of banks, a judgment dissolving the corporation was rendered, commissioners appointed to close its affairs, and all judicial proceedings against it stayed. Plaintiffs having obtained a rule on defendants, to show cause why certain checks drawn by, or on the bank, should not be received by the commissioners in compensation of a debt of plaintiffs to the bank, and the evidence of such debt given up: *Held*, that the act having declared that, in all matters not otherwise provided for, the proceedings for the liquidation of the banks shall be the same as those prescribed in the acts relative to the voluntary surrender of property, and no especial provision having been made, the rule must be discharged.

White v. Commissioners of the Merchants Bank of New Orleans, 363.

3. Under the second section of the act of 5th of February, 1842, ch. 22, reviving the charters of the Banks in the city of New Orleans, the Board of Cur-

rency are entitled to free access to the vaults and books of the Banks ; may call upon their officers at any time ; may take such memoranda and lists as they think proper and necessary ; and may require any officer of such Banks to submit their books and papers to their inspection and examination. But they have no right to call upon those institutions, to make out, at their own expense, statements not expressly required of them by law, though demanded by the Board for the purpose of obtaining information, which it is required by law to lay before the Legislature. The law only exacts that the members of the Board shall be allowed to examine, for themselves, the books and papers of the Banks. *State v. Union Bank of Louisiana*, 499.

4. The second section of the act of 24th of February, 1842, ch. 59, supplementary to the act for preventing the further violation of law by the Banks, which imposes a penalty on any president, officer, agent, or clerk of any Bank who shall fail to give a full and complete statement relative to its affairs when required by competent authority, was passed with reference to former laws, and only points out the punishment to be inflicted on those violating their provisions. *Ib.*

See AGENCY, 3. DOMICIL.

BANK OF THE UNITED STATES OF PENNSYLVANIA.

1. A contract made in this State, by the Bank of the United States, created by the State of Pennsylvania, to secure the re-payment of money loaned here, is valid. *Frazier v. Willcox*, 517.
2. Nothing in the charter of the Bank of the United States created by the State of Pennsylvania, prohibited it from making loans in Louisiana, at the highest rate of interest allowed by the laws of the latter State ; and such loans are not usurious. *Ib.*

BANKRUPTCY.

1. Decision in the case of *Fisher and another v. Vose*, 3 Robinson, 457, affirmed. *West v. His Creditors*, 88.
2. An application, under the act of Congress of 19th August, 1841, to be declared a bankrupt, made by the insolvent, will have the effect of arresting all proceedings against him, until a decree is rendered by the court sitting in bankruptcy. *Ib.*
3. One who has applied to be declared a bankrupt, under the act of Congress of 19th of August, 1841, must remain in that situation until he is so declared, or his application is rejected. He has no right to dispose of his property, in any way, while such application is pending. He is bound to preserve it for the common benefit of all his creditors, and may exercise such power over it as may be necessary for that purpose. In a case of involuntary bankruptcy the rule may be different. *Ib.*
4. Plaintiff having made a surrender of his property under the insolvent laws of the State, subsequently applied to the District Court of the United States

to be declared a bankrupt under the act of Congress of 1841. Previous to the latter application, his wife, who had obtained a judgment against him, had levied a *fi. fa.* on a claim belonging to the insolvent, alleged to have formed a part of the property given up to his creditors, at the time of his surrender under the insolvent laws of the State. The syndic appointed under the State laws, having taken a rule upon plaintiff to show cause why he should not deliver to him the certificate of the claim, and neither the assignee under the act of Congress, nor the wife of the insolvent having been made parties: *Held*, that the case must be remanded that the question which of the creditors are entitled to claim, may be decided contradictorily with the assignee, and the wife. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Election of Domicil as to Promissory Notes in favor of Banks, under the act of 13th March, 1818.*

II. *Transfer.*

III. *Presentment for Payment and Protest.*

IV. *Evidence in Action on.*

V. *Defence to Action on.*

VI. *Responsibility of Agents employed to collect.*

I. *Election of Domicil as to Promissory Notes in favor of Banks, under the act of 13th March, 1818.*

1. The act of 13th March, 1818, relative to the election of domicil, with regard to promissory notes, executed in favor of the banks, is repealed by sect. 25 of the act of 25th March, 1828.

Union Bank of Louisiana v. Lattimore, 342.

II. *Transfer.*

2. By endorsing a note, joint in their favor, the payees, each of whom can claim only a portion of its amount equal to that of the others, transfer only their respective interests in it; and, on the failure of the maker to pay, each will be liable to the holder to the extent of such interest only. C. C. 2979.

Baggett v. Rightor, 18.

3. The endorsee of a promissory note, transferred before maturity, will not be affected by any want of consideration between the maker and the payee, of which he was not aware at the time of the transfer.

Melançon v. Melançon, 33.

III. *Presentment for Payment and Protest.*

4. Diligent inquiry for the maker of a note and for his domicil, without effect, will excuse the want of a formal demand of payment.

Baggett v. Rightor, 18.

5. Where the endorser of a note has died, notice of protest must be sent to his legal representatives. A notice addressed to the deceased by name, will be bad. And plaintiffs must show that a certain degree of diligence was used to ascertain the executor, administrator, or heirs and representatives of the deceased. *Bank of Louisiana v. Smith*, 276.
6. Notice of protest served on an attorney in fact, is sufficient, though the procuration does not confer specially the power to receive such notices, if it gives general powers to transact the business of the principal, he being abroad. To transmit such notice to the latter at a distant place, might endanger his recourse against previous endorsers, or the maker. *Aliter*, where the power is a limited one, conferring only certain special enumerated powers. In such a case, the procuration cannot be extended beyond what is expressed therein; and the power to receive a notice of protest is not necessarily included in that of endorsing. *De Lizardi v. Pouverin*, 393.

IV. Evidence in Action on.

7. A statement in the protest of a notary, that a demand of payment had been made of the maker of a note, and payment refused, is sufficient proof of an amicable demand. *Flower v. Dubois*, 78.
8. Where the protest and certificate of notice have been made in the manner required by the act of 13 March, 1827, copies thereof, certified by the notary to be true copies from the originals in his office, will be evidence of all the matters therein contained. It is not necessary that the certificate should state that such copies were made from a record made in the presence of two witnesses. *Johnson v. Marshall*, 157.
9. The certificate of notice of the protest of a bill or note, signed by the notary alone, without the attestation of two witnesses, is insufficient. Such notice must be shown by testimony under oath, or by an official certificate in strict compliance with legal forms. *Ib.*
10. The act of 27 March, 1823, so far as it renders the maker of a note, bill of exchange, or other negotiable paper incompetent, under any circumstances, as a witness in an action against an endorser, was repealed by art. 3521 of the Civil Code. *Ib.*
11. The execution of a note raises a presumption that a just consideration has been given for it; and the maker who pleads error or failure of consideration, must show it: but where one partner is sought to be made liable on a note given by the other, and he alleges fraud and want of consideration, and shows circumstances somewhat suspicious, the burden of proving the consideration will be on the plaintiff. *Harrison v. Poole*, 193.
12. A general denial will place the *onus* of proving notice of protest on the plaintiff, who must establish that such notice was sent to the post office, nearest to defendant's residence, whether in the same or another state; and the latter may, under the general issue, show that the office to which it was sent was not the nearest. *Pollard v. Cook*, 199.
13. Where the fact of a partnership is clearly shown, and that the bills of exchange sued on were drawn for the purpose of carrying on the business

contemplated by the parties, plaintiffs will not be required to show, that they knew of the existence of the partnership when they took the bills.

Robertson v. De Lizardi, 300.

V. Defence to action on.

14. Where it was agreed between the payee and maker of a note, that payment should not be exacted in the event of a certain action being decided against the latter, and the maker afterwards, by compromising the suit, renders the fulfilment of the condition impossible, his obligation to pay will become perfect. C. C. 2035. *Rightor v. Aleman*, 45.
15. The maker of a note given to the payee for surveys made by the latter at his instance, cannot resist payment on the ground that the amount was out of proportion to the value of the services rendered. Such a case is not one in which relief can be had on the ground of lesion. C. C. 1854, 1855, 1856, 1857. *Ib.*
16. In an action by the payee, against the endorsers of a note who put their names on it merely to secure its payment, the latter must be viewed as sureties, and as such will be entitled to avail themselves of all the pleas, not personal to the principal, of which he could take advantage: C. C. 2208.
Johnson v. Marshall, 157.
17. Where one, not a party to a bill or note, puts his name upon it, he will be presumed to have done so as surety. *Gilbert v. Cooper*, 161.
18. Where a receipt signed on the execution of a note, recites that it is made in renewal of another in the possession of the payees, which is to be returned by them, or, in default thereof, that the note last executed is to be null, payment of the latter cannot be required until the obligors are put in possession of the first note. It is a condition precedent, upon which the right of recovery depends. *Ib.*
19. Where, in an action against the drawer and endorsers of a promissory note, plaintiffs, after obtaining judgment and execution against the former, order a stay of execution without the assent of the endorsers, the latter will be discharged. *Bank of Louisiana v. Smith*, 276.
20. Where notes secured by mortgage, delivered by the maker, have come again into his hands before maturity, the debt evidenced by them is extinguished by confusion. C. C. 2214. By re-issuing such notes, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage securing them, which being only an accessory to the debt between the maker and the payee, was extinguished with it. C. C. 3252, 3374.
Hill v. Hall, 416.
21. Where the holders of a note, the payment of which the makers guaranteed by the pledge of another note secured by mortgage, do any act by which the mortgage is destroyed, the endorsers of the first note will be released, they having a right to be subrogated to the mortgage. C. C. 3030.

Commissioners of the Merchants Bank v. Cordevielle, 506.

VI. Responsibility of Agents employed to collect.

22. Bills of exchange and promissory notes are generally placed with a bank

for collection, with a notary for protest, and with an attorney to be put in suit. In such cases where the bank, the notary, or the attorney is *omni exceptione major*, an agent who may have received the note for collection, will not be responsible for their neglect or misconduct.

Hum v. Union Bank of Louisiana, 109.

CATHOLIC CHURCH.

Neither the pope, nor any bishop of the Roman Catholic Church has any authority but a spiritual one, within this State.

Church of St. Francis of Pointe Coupée v. Martin, 62.

See CHURCH OF ST. FRANCIS OF POINTE COUPÉE, 2.

CHURCH OF ST. FRANCIS OF POINTE COUPÉE.

1. The church wardens appointed under the act of 14th March, 1814, incorporating the congregation of the Roman Catholic Church of St. Francis of Pointe Coupée, are in their corporate character, the legal owners of the property which that act authorizes them to hold for the purposes therein specified. They are its sole temporal administrators, and cannot be controlled in its administration by the clergy. They are responsible to the congregation alone, who may elect others in their place, in case of misuse or abuse of the powers conferred on them by law.

Church of St. Francis of Pointe Coupée v. Martin, 62.

2. The church wardens of the church of St. Francis of Pointe Coupée have the exclusive power of fixing the salary of the parish priest, or the tariff of fees to be paid by the parishioners for marriages, burials, funeral services, &c. No such power can be exercised by the pope or any bishop. *Ib.*

CITATION.

See APPEAL, IV. PLEADING, 19, 21.

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. *Civil Code of 1808.*

II. *Civil Code.*

III. *Code of Practice.*

I. *Civil Code of 1808.*

Preliminary Title, Art. 12. Prohibitory laws. *Morton v. Reynolds*, 26.

Book I, Title VIII, art. 51. Power and duties of tutor. *Ib.*

art. 59. Sale of minor's property. *Ib.*

— III, Title I. art. 7. Vacant estates. *Leonard v. Fluker*, 148.

art. 74. Successions. *Ib.*

Book I, Title II. art. 40. Substitutions and *fidei commissa*. *M'Cluskey v. Webb*, 201.

III. arts. 244, 245, 246. Proof of unwritten contracts over \$500 in value, *Rost v. Henderson*, 468.

XX. art. 72. Possession. *M'Cluskey v. Webb*, 201.

II. Civil Code.

- 21. Equity powers of judges. *Frazier v. Willcox*, 517.
- 184. Emancipation of slaves. *Succession of Ducloslange*, 409.
- 193, 194, 196. *Statu liberi*. *Nimmo v. Bonney*, 176.
- 346. Acceptance of inheritance by minor. *Picou v. Dussuau*, 412.
- 355, 356. Minor. *Tutorship of Hacket*, 290.
- 423, 437. Corporations. *Frazier v. Willcox*, 517.
- 489. Ownership of property, how divested. *Application of Mayor, &c., of New Orleans, for widening of Roffignac Street*, 357.
- 495. Possession. *M'Cluskey v. Webb*, 201.
- 826, 829. Limits, fixing of. *Buisson v. Grant*, 360.
- 840. ———— *Orillion v. Slack*, 120.
- 1000, 1001. Successions. *State v. Judge of Probates of New Orleans*, 42.
- 1002. ———— *Ib. Picou v. Dussuau*, 412.
- 1003. ———— *State v. Judge of Probates of New Orleans*, 42.
- 1029, 1040, 1051. ———— *Picou v. Dussuau*, 412.
- 1095, 1099, 1100, 1101, 1103. ———— *Babin v. Nolan*, 278.
- 1181. ———— *State v. Judge of Probates of New Orleans*, 42. *Succession of Ducloslange*, 409.
- 1215. Division of thing held in common. *Montfort v. Her Husband*, 453.
- 1265. Successions. *Landry v. LeBlanc*, 37.
- 1459, 1460. Donations *mortis causa*. *First Congregational Church of New Orleans v. Henderson*, 209.
- 1507, 1509. Substitutions and *fidei commissa*. *Succession of Ducloslange*, 409.
- 1563, 1569. Donations *mortis causa*. *Rost v. Henderson*, 468.
- 1605. ———— *M'Cluskey v. Webb*, 201.
- 1626. ———— *Johnson v. Pilster*, 71.
- 1652. ———— *Succession of Ducloslange*, 409.
- 1665. Testamentary executor. *Ib.*
- 1671. ———— *State v. Judge of Probates of New Orleans*, 42.
- 1679. ———— *Succession of Cucullu*, 397.
- 1691, 1692. Donations *mortis causa*. *First Congregational Church of New Orleans v. Henderson*, 209.
- 1750. Natural obligations. *Rosenda v. Zabriskie*, 493.
- 1751. ———— *Rost v. Henderson*, 468.
- 1815. Error of fact. *Tutorship of Hacket*, 290.
- 1840. ———— in law. *Landry v. Connely*, 127. *Urquhart v. Gove*, 207.

1841. Fraud. *Phillipi v. Gove*, 315.
 1854, 1855, 1856, 1857. Contracts. *Rightor v. Aleman*, 45.
 1860, 1870. ——— *Lea v. Myers*, 8.
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 1905, 1906, 1907. ——— *Egerton v. Buckner*, 346.
 1917. ——— *Gontier v. Thomas*, 435.
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 1973. ——— *Barrett v. His Creditors*, 408.
 1979, 1980. ——— *Ib. New Orleans Gas Light and Banking Company v. Currell*, 438.
 1981. ——— *New Orleans Gas Light and Banking Company v. Currell*, 438.
 1982. ——— *Ib. Barrett v. His Creditors*, 438.
 1984. ——— *New Orleans Gas Light and Banking Company v. Currell*, 438.
 1987. Rights not liable for debts. *Vance v. Lafferanderie*, 340.
 1989. Contracts. *Walker v. Vaudry*, 395. *New Orleans Gas Light and Banking Company v. Currell*, 438.
 2019, 2023. ——— *Gilbert v. Cooper*, 161.
 2035. ——— *Rightor v. Aleman*, 45.
 2064. ——— *Grayson v. Houston*, 54.
 2079. ——— *Baggett v. Rightor*, 18.
 2129. Payment in error. *Massias v. Gasquet*, 137.
 2163, 2164. Real tender. *Small v. Zacharie*, 144.
 2173. *Cessio bonorum*. *Succession of Ducloslange*, 409.
 2183. 2185. Novation. *Rosenda v. Zabriskie*, 493.
 2204. Compensation. *Low v. Thomas*, 183.
 2208. ——— *Johnson v. Marshall*, 157.
 2214. Confusion. *Hill v. Hall*, 416.
 2218. Contracts. *Lea v. Myers*, 8.
 2229 to 2242. Evidence. *Johnson v. Marshall*, 157.
 2243. ——— sale or exchange of real property. *Ib. Gontier v. Thomas*, 435.
 2244 to 2251. ——— *Johnson v. Marshall*, 157.
 2252. ———, confirmative acts. *Landry v. Connely*, 127. *Johnson v. Marshall*, 157.
 2253, 2254, 2255. ——— *Johnson v. Marshall*, 157.
 2256. ——— *Ib. Firemen's Insurance Company of New Orleans v. Cross*, 508.
 2257. ——— *Johnson v. Marshall*, 157. *Rost v. Henderson*, 468.
 2258, 2259. ——— *Johnson v. Marshall*, 157.
 2260. ——— *Meeks v. Landry*, 31.
 2261 to 2270. ——— *Johnson v. Marshall*, 157.
 2279, 2280. Payment through error. *Massias v. Gasquet*, 137.
 2314. Husband and wife. *Rousse v. Wheeler*, 114.

- 2327, 2330. Dowry. *Montfort v. Her Husband*, 453.
 2337, 2338, 2339, 2340. Marriage contract. *Ib.*
 2342, 2355. Dowry. *Ib.*
 2367. Mortgage of wife for paraphernal property. *Johnson v. Pilster*, 71.
 Rousse v. Wheeler, 114
 2371. Community of gains. *Ib.*
 2377. ————— *Babin v. Nolan*, 278.
 2379 to 2389. ————— *Johnson v. Pilster*, 71.
 2412. Husband and wife. *Rousse v. Wheeler*, 114.
 2417. Sale. *Brassac v. Ducros*, 335.
 2449. — *Phillipi v. Gove*, 315.
 2456. — *Gontier v. Thomas*, 435.
 2463. — *Montgomery v. Brander*, 401.
 2474. — *Toledano v. Desban*, 330.
 2480. — *Ogden v. Michel*, 155.
 2495. — *Kittridge v. Breaud*, 79.
 2512. Prescription. *Ogden v. Michel*, 155.
 2518. Sale. *Ledoux v. Armor*, 381.
 2616. — *Massias v. Gasquet*, 137.
 2664. Lease. *Scudder v. Paulding*, 428.
 2674. — *Morton v. Reynolds*, 26. *Plummer v. Schlatre*, 29.
 2689, 2690. — *Macarty v. Lepaullard*, (2d case,) 425.
 2734. Contracts for building. *Alston v. Ross*, 399.
 2762. Mortgage. *Johnson v. Pilster*, 71.
 2881, 2882, 2886, 2892, 2893. Loan. *Egerton v. Buckner*, 346.
 2941 to 2950. Sequestration. *Frazier v. Willcox*, 517.
 2954 to 2975. Mandate. *Ib.*
 2976, 2977. — *Hum v. Union Bank of Louisiana*, 109. *Frazier v. Willcox*, 517.
 2978 to 3003. — *Frazier v. Willcox*, 517.
 3011, 3012. Surety. *Lard v. Strother*, 95.
 3018. — *Baggett v. Rightor*, 18.
 3026. — *Cougot v. Fournier*, 420.
 3029. — *Johnson v. Marshall*, 157.
 3030. — *Lard v. Strother*, 95. *Commissioners of the Merchants Bank of New Orleans v. Cordeviollé*, 506.
 3033. — *Lard v. Strother*, 95.
 3152, 3195. Privilege. *Bonnabel v. Rabeneau*, 419.
 3233, 3236. — *Cassidy v. His Creditors*, 216.
 3252. Mortgage. *Hill v. Hall*, 416.
 3288, 3281. — *Johnson v. Pilster*, 71.
 3287. — *Montfort v. Her Husband*, 453.
 3290. — *Ex parte Nicholls*, 52.
 3297. — *Succession of Falconer*, 5.
 3298. — *Johnson v. Pilster*, 71.
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- 644, 647. *Fieri facias*. *Vance v. Lafferanderie*, 340.
 710. ————— *Collins v. Daly*, 112.
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 732. Executory process. *Minot v. Bank of the United States*, 490.
 733. ————— *Erwin v. Walton*, 328.
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 740. ————— *Slidell v. Rightor*, 59. *Lard v. Strother*, 95. *Minot v. Bank of the United States*, 490.
 741. ————— *Slidell v. Rightor*, 59.
 746, 748. ————— *Pillet v. Edgar*, 274.
 751. ————— *Slidell v. Rightor*, 59.
 756. Summary process. *Ib*.
 775, 776, 777. Clerks of court. *Ex parte Nicholls*, 52.
 829, 830. Mandamus. *State v. Judge of the Commercial Court*, 227.
 896. Appeal. *Corlis v. Tyler*, 443.
 897. ————— *Segur v. Hill*, 147. *Corlis v. Tyler*, 443.
 924. Jurisdiction of Probate Court. *Babin v. Dodd*, 20. *Picou v. Dussuau*, 412.
 983, 992. Claims against successions. *Picou v. Dussuau*, 412.
 995. ————— *Babin v. Dodd*, 20.
 996. ————— *Ib*. *Picou v. Dussuau*, 412.
 1000, 1001, 1002, 1003. Petition of heirs to be put in possession of inheritance. *Babin v. Nolan*, 278.
 1037. Powers of Courts of Probates. *Ib*.

COMPENSATION.

1. Article 1265 of the Civil Code, which provides that "any co-heir of age, at the sale of the hereditary effects, can become a purchaser to the amount of the portion owing to him from the succession, and is not obliged to pay the surplus of the purchase money over the portion coming to him, until this portion has been definitively fixed by a partition," does not apply to the case of a husband who resists the payment of a note executed by him, in the hands of the administrator of the succession of the payee, on the ground that his wife is an heir of the deceased. *Landry v. LeBlanc*, 37.
2. Compensation takes place by the mere operation of law, the two debts being extinguished as soon as they exist simultaneously. *C. C. 2204*.
Low v. Thomas, 183.
3. A claim is sufficiently liquidated to be susceptible of compensation, when its correctness is admitted by the debtor. *Reynaud v. His Creditors*, 514.

CONFUSION.

Where notes secured by mortgage, delivered by the maker, have come again into his hands before maturity, the debt evidenced by them is extinguished by confusion. *C. C. 2214*. By re-issuing such notes, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage

securing them, which being only an accessory to the debt between the maker and the payee, was extinguished with it. C. C. 3252, 3374.

Hill v. Hall, 416.

CONTRACTS.

- I. *Parties, and consent necessary to form.*
- II. *Conditional Contracts.*
- III. *Alternative Contracts.*
- IV. *Illegal Contracts.*
- V. *Confirmation.*
- VI. *Avoidance.*
- VII. *Proof.*

I. *Parties, and consent necessary to form.*

1. One who has undertaken to build a house by the job, according to a plan agreed on, cannot claim an increase of pay for extra work, unless he proves that it was done at the request of the other party. C. C. 2734.

Alston v. Ross, 399.

2. It appeared from a copy of a lease offered in evidence, that changes had been made in the original instrument, which were indicated in the margin, but not signed by the parties. *Held*, that until all parties had approved of the proposed changes, the contract was not valid, and consequently inadmissible. *Macarty v. Lepaullard*, 425.

3. Under no circumstances can a wife become surety for her husband. The form of the contract will be disregarded. Those who treat with married women, must see that the obligations they contract turn to their advantage.

Firemen's Insurance Company of New Orleans v. Cross, 408.

4. The Legislature has power to prohibit foreign corporations from contracting in this State; but until it does so, contracts so made will be enforced.

Frazier v. Willcox, 517.

5. A contract made in this State, by the Bank of the United States, created by the State of Pennsylvania, to secure the repayment of money loaned here, is valid. *Ib.*

6. Arts. 423 and 437 of the Civil Code, cannot be construed to forbid corporations created by other States, from contracting in this. Art. 423, is directory only, and declares that corporations, meaning those in the State, must be created by the Legislature. The alternative expression, "*unauthorized by law, or by an act of the Legislature*," in art. 437, shows that it alludes to other corporations than those created by the Legislature of this State, and intended to acknowledge the public character of corporations authorized by the laws of foreign States. *Ib.*

II. *Conditional Contracts.*

7. Where it was agreed between the payee and maker of a note, that pay-

ment should not be exacted in the event of a certain action being decided against the latter, and the maker afterwards, by compromising the suit, renders the fulfilment of the condition impossible, his obligation to pay will become perfect. C. C. 2035. *Rightor v. Aleman*, 45.

8. Where a receipt signed on the execution of a note, recites that it is made in renewal of another in the possession of the payees, which is to be returned by them, or, in default thereof, that the note last executed is to be null, payment of the latter cannot be required until the obligors are put in possession of the first note. It is a condition precedent, upon which the right of recovery depends. *Gilbert v. Cooper*, 161.
9. Where a party's right to recover depends on an act to be done by him, he must show an actual tender and refusal, or that every thing has been done by him, which could be done, to give effect to the contract. *Ib.*
10. Action on certain bills protested for non-payment. Defence that plaintiff had agreed to renew the bills for three months from maturity, and proof of that fact and of tender by defendants of notes for the renewal. Held, that the obligation under the original bills was extinguished by novation, and that plaintiff could not recover, even with a stay of execution, till the expiration of the three months. *Benedict v. Stow*, 390.

III. Alternative Contracts.

11. An obligation to pay a certain sum on a particular day, to be discharged by the delivery of a slave of a certain value, is an alternative obligation, from which the debtor may exonerate himself by delivering either of the two things; but he cannot force the creditor to receive a part of one, and a part of the other. So where the creditor has the election, he cannot take a part of the things to be paid or delivered. *Grayson v. Houston*, 54.

IV. Illegal Contracts.

12. No action can be maintained on an agreement entered into with a view to contravene the general policy of the law. The illegality of a contract, arising from transactions in *fraudem legis*, may be always opposed by the party who wishes to recede from it.

First Congregational Church of New Orleans v. Henderson, 209.

13. A promise to pay usurious interest is not such a natural obligation as will form a good consideration for a legal contract. A natural obligation is one which cannot be enforced by action, but which is binding in conscience and according to natural justice. C. C. 1750, § 2. To perform a promise is a matter of conscience; and if a contract, not illicit or immoral, but to enforce which the law gives no remedy is actually performed, as where usurious interest has been paid, the money cannot be recovered. But the continuance of a promise, contrary in itself to law, cannot be enforced, however often the parties may change the evidence of it.

Rosenda v. Zabriskie, 493.

14. Where a contract stipulates for usurious interest, the creditor can only recover the principal debt. *Ib.*

15. Art. 2256 of the Civil Code, which forbids the introduction of evidence against, or beyond what is contained in public acts, does not apply to contracts made in *fraudem legis*. A party may show by parol the real nature of such contracts.

Firemen's Insurance Company of New Orleans v. Cross, 508.

V. Confirmation.

16. An obligation, though null and void *ab initio*, may be ratified or confirmed expressly or tacitly, verbally, in writing, or by acts manifesting clearly such an intention, or even, in some cases, by silence. C. C. 2252.

Landry v. Connely, 127.

VI. Avoidance.

17. The maker of a note given to the payee for surveys made by the latter at his instance, cannot resist payment on the ground that the amount was out of proportion to the value of the services rendered. Such a case is not one in which relief can be had on the ground of lesion. C. C. 1854, 1855, 1856, 1857. *Rightor v. Aleman*, 45.

18. A restriction on the power of a partner to use the name of the firm in the usual course of trade, will be without effect, as to third persons without notice. Not even fraud on the part of one partner will be any defence for his co-partners, where the obligation was contracted in the usual course of their trade, and the fraud was not participated in by the creditor.

Harrison v. Poole, 193.

19. A contract or payment made for the purpose of avoiding litigation, cannot be rescinded for error of law. C. C. 1840. *Urquhart v. Gove*, 207.

VII. Proof.

20. The general rules of evidence established by the Civil Code, book III., tit. IV., ch. 6, arts. 2229 to 2270, are applicable to all contracts whatever.

Johnson v. Marshall, 157.

21. The exceptions made by arts. 244, 245, and 246 of the third title of the third book of the Code of 1808, to the rule laid down in art. 243 of the same title and book, as to the proof of contracts which may be appraised in money, exceeding five hundred dollars in value, are virtually repealed by the Civil Code of 1825. C. C. 2257. *Rost v. Henderson*, 468.

CORPORATIONS.

1. The Legislature has power to prohibit foreign corporations from contracting in this State; but until it does so, contracts so made will be enforced.

Frazier v. Willcox, 517.

2. The capacity of a foreign corporation to sue, is well established. *Ib.*

3. Art. 423 and 437 of the Civil Code, cannot be construed to forbid corporations created by other States, from contracting in this. Art. 423 is directory only, and declares that corporations, meaning those in the

State, must be created by the Legislature. The alternative expression, "*unauthorized by law or by an act of the Legislature*," in art. 437, shows that it alludes to other corporations than those created by the Legislature of this State, and intended to acknowledge the public character of corporations authorized by the laws of foreign States. *Ib.*

4. The act of 13th March, 1837, ch. 66, relative to limited or anonymous partnerships, does not apply to corporations, but to private associations of individuals. *Ib.*
5. A foreign corporation authorized to contract in this State, may contract according to its laws, where the charter contains no prohibition. *Ib.*

See EVIDENCE, 52.

COSTS.

Defendants admitting a part of the debt sued for to be due, pleaded a tender; and plaintiff having moved for a judgment for the amount so admitted, it was rendered without a trial, for that sum, with costs, leaving the case open as to the balance of the claim: On appeal, *held*, that as to the costs, the judgment was premature; that being thrown by the law on the party cast, they should not be taxed before the final determination of the suit; and that, should defendants prove the tender, and establish the other part of their defence, the costs must fall upon the plaintiff. *Small v. Zacharie*, 144.

COURTS.

1. The ordinary tribunals have jurisdiction of suits against heirs, whether minors or of age, in all cases where an estate, after having been administered by a curator, testamentary executor, or tutor of a beneficiary heir, has come into their possession, or has been absolutely accepted; while the courts of probate have exclusive cognizance of all claims for money against successions under the management of curators, testamentary executors, or administrators. C. P. 924, 995, 996. *Babin v. Dodd*, 20.
2. Claims against minors, interdicted or absent persons, whose estates are administered by curators, may be recovered before the ordinary tribunals. It is no objection to the exercise of such jurisdiction, that courts of probate have alone the means and right of fixing the amount which a tutor may allow for the expenditures of his ward. Proof of the means and revenue of the latter may be adduced before either tribunal; nor would any judgment of an ordinary court, allowing the claim, interfere with the powers of the court of probate, when auditing the tutor's accounts, to reject such portion of the sum paid under the judgment as might be found to exceed the revenue of the ward; as the tutor would be liable for any illegal acts or contracts made by him, on which such judgment was rendered. *Ib.*
3. A District Court cannot arrest, by injunction, process issued from a Parish Court. *Borne v. Porter*, 57.

4. Courts of justice sit to enforce civil obligations only, and will not attempt to enforce those of a spiritual character.
Church of St Francis of Pointe Coupée v. Martin, 62.
5. Where the purchaser of property of a succession, sold by order of a Court of Probates, fails to comply with the terms of the sale, that court has authority to compel a compliance, or to order the property to be sold anew, *à la folle enchère*. *Landry v. Connely*, 127.
6. The Court of Probates having jurisdiction of actions for the partition of successions, must necessarily inquire what property composes the estate to be partitioned, and have power to decide upon questions of title incidental to the main question of partition, though without jurisdiction, under other circumstances, to decide such a question. *Penny v. Weston*, 165.
7. Cases in which the judge has recused himself, transferred in pursuance of the act of 27th February, 1841, ch. 32, from the Court of Probates, to be tried before the special Judge provided by that act, sitting in the District Court, are to be tried in the same manner as if they had not been removed. The law, having made no provision for a trial by jury in the Court of Probates, none can be allowed in any such case by the special judge. *Ib.*
8. Courts of ordinary jurisdiction have exclusive cognizance of actions to annul a partition of slaves, made among the heirs of a succession.
Clark v. Christine, 196.
9. Courts of Probate have concurrent jurisdiction, with the District Courts, of an action by the heir for the settlement and partition of the community which existed between a husband and wife, after its dissolution by the death of the latter; and the circumstance of the defendant's denying the heirship of the plaintiff, and alleging himself to be the heir, can in no manner change the nature or object of the action, so as to deprive the Court of Probates of its jurisdiction. Nor can its jurisdiction be affected by the fact that the plaintiff's right to inherit must be determined, before proceeding to examine the issues relative to the settlement and liquidation of the community; the competency of the court being determined by the nature of the legal rights which the plaintiff seeks to enforce, and not by the question of his right to recover. *Babin v. Nolan*, 278.
10. Under art. 1037 of the Code of Practice, Courts of Probate are possessed of all the powers necessary to the exercise of their jurisdiction; and they may consequently take cognizance of questions of title arising collaterally, the examination of which is necessary to the decision of the issue joined. *Ib.*
11. Where the tutor of a minor, also the tutor of the minor heirs of a former tutor of the same minor, tenders in the Court of Probates, in his double capacity, his account to his late ward after his majority, it will be no objection, on an opposition by the latter, claiming a tract of land, or its proceeds omitted in the account, and alleged by the tutor to belong to the community which existed between the former tutor and the mother of the other minors, that the judgment, if in favor of the opponent, would be in substance against the heirs of such former tutor, who are not parties to the proceedings, and that the question is one of title, not within the jurisdiction of the Probate

- Court. The minor heirs of the first tutor are represented by their tutor, the only person authorized by law to represent them ; and the Court of Probates is empowered to determine questions of title, arising collaterally on the trial of other matters within its jurisdiction. *Tutorship of Hacket*, 290.
12. Art. 996 of the Code of Practice, which provides, that when an estate "is in the possession of heirs, either present, or represented in the State, though all or some of them be minors, actions for debts due from such successions shall be brought before the ordinary tribunals, either against the heirs themselves, if they be of age, or against their curators, if they be under age or interdicted," applies to estates accepted absolutely, or to those which, after having been administered by a curator, testamentary executor, &c., have come into the possession of the heirs. If the heirs be all of age, and accept unconditionally, they are immediately put in possession of all the property, and are suable before the ordinary tribunals for their virile portion of the debts, as if contracted by themselves. If some are minors, the succession cannot be accepted by, nor for them, but with the benefit of inventory. When thus accepted, it cannot be administered partially, but the whole estate must be placed under the management of an administrator, and no part comes legally into the possession of the heirs as such, until the administration is terminated, or a partition is legally made among the heirs. Until such administration or partition, the estate must be administered under the authority of the Court of Probates, in which it was opened, and all claims for money against it must, under arts. 924, § 13, and 983 of the Code of Practice, be presented there for settlement. C. C. 1002, 1040, 1051. C. P. 992. Act 25th March, 1828, ch. 83, § 13. *Picou v. Dussuau*, 412.
13. The judges of the inferior courts cannot, of their own accord, appoint receivers for the purpose of collecting or keeping funds, or evidences of debt which may be the subject of litigation before them. Such appointments can be made only with the consent of all the parties interested, and the assent of the judge can add nothing to the powers of the persons so appointed. *Frazier v. Willcox*, 517.

See APPEAL, 1, 2. NEW ORLEANS, CITY OF, 1.

CURATOR AD HOC.

Defendants having obtained an order of seizure and sale on a judgment rendered in another State, plaintiff became the purchaser of his own property at a twelve months credit, for the price of which he gave a bond in conformity to law. Previous to its becoming due, he obtained an injunction to prevent defendants from issuing any execution on it, and procured the appointment of a curator *ad hoc*, to represent the defendants, who resided in another State. A commission to take testimony having been taken out by plaintiff, he caused the interrogatories to be served on the curator *ad hoc*. On an objection to the admission of the depositions: *Held*, that defendants having an attorney of record in the proceedings to obtain the order of seizure and sale, the case was not one for the appointment of a curator *ad hoc* :

and that the interrogatories, not having been served on the defendants, or their counsel, were inadmissible. *Lard v. Strother*, 95.

CUSTOM, COMMERCIAL,

See SALE, 19.

DEFAULT.

See JUDGMENT BY DEFAULT.

DOMICIL.

1. The act of 13th March, 1818, relative to the election of domicile, with regard to promissory notes, executed in favor of the banks, is repealed by sect. 25 of the act of 25th March, 1828.

Union Bank of Louisiana v. Lattimore, 342.

2. Where the stockholder of a bank gives a note to the institution, even for the re-payment of a sum he was entitled to borrow, under its charter, the claim of the bank against him, is similar to that against any other borrower; and the obligation of the stockholder, results rather from his note, than from any relations as a partner in the bank. He cannot, consequently, where his domicile is in another parish, be cited before the tribunals of the place where the bank is established, under art. 165, No. 2, of the Code of Practice, relative to suits against partners. *Ib.*

DONATIONS MORTIS CAUSA.

1. The executors appointed by the testator, or, in case of their failure to act, a dative testamentary executor, are the only persons competent to carry the provisions of a will into effect.

State v. Judge of Probates of New Orleans, 42.

2. A bequest by testament duly proved and ordered to be executed, is a title translatif of property, as much as a donation *inter vivos*. C. C. 3451.

Sides v. Nettles, 170.

3. The legatee of a particular object will not be presumed to be cognizant of any defect of title in the testator, but be regarded as a possessor in good faith. *Ib.*
4. A bequest by which the testator directs that certain slaves shall be given to his legatees, to serve them until such slaves attain a certain age, when they are to be emancipated, is not a *fidei-commissum*. The emancipation is a donation to the slaves of their value, to be received at a future and fixed period; and the usufruct, or hire of them in the mean time, is a legacy to those in whose favor it is made. *Nimmo v. Bonney*, 176.
5. Where slaves are directed by a testator to be immediately emancipated by his executors, the heirs of the deceased will be entitled to retain them in

- their possession, and to enjoy their services, until they can be legally emancipated. *Ib.*
6. The validity of a judgment ordering the execution of a will cannot be inquired into collaterally. *McCluskey v. Webb*, 201.
 7. A bequest of whatever may remain after the payment of debts to a sister of the testator, for the purpose of educating her children, and subsisting her and them, with power to her to make such other disposition of the property to their use and benefit as circumstances may require; and providing that his brother shall participate in such property, to a certain extent, should he consider himself in equal need with his sister's family, is not a substitution or a *fidei-commissum*. *Per Cur.* The testator does not leave the property to his sister to preserve it for, and surrender it at any time to her children. She has the entire control of it, to maintain herself and children, to educate them, and to do whatever she may think their interest requires. She may expend it all for such purposes. *Ib.*
 8. A substitution is never presumed. Unless the will cannot be understood otherwise it will be maintained. *Ib.*
 9. Defendant's ancestor bequeathed \$2000 a year, for five years to plaintiffs, to commence five years after his death. At the time of the bequest and of the testator's death, plaintiffs were prohibited by their charter, from receiving any legacy exceeding \$1000; but this restriction was removed by an act of the Legislature before the first annual payment became due. A compromise having been entered into between the heirs and legatees, by which it was stipulated that a certain amount should be paid to plaintiffs by the heirs, in satisfaction of their legacy, this action was commenced to recover the portion due by the defendant. *Held*, that plaintiffs can only take \$1000; that the term fixed by the testator for the payment of the legacy, cannot be assimilated to a condition; that in the former case the right is acquired and perfect, the exercise of it being only suspended, while in the latter, it is uncertain whether the legatee will ever be able, in consequence of the condition, to claim the legacy; that in the first case, the right could not be acquired by a person incapable at the testator's death; but that in the second, the capacity is only required to exist at the time of the accomplishment of the condition; (C. C. 1459, 1460, 1691, 1692;) and that the want of capacity at the death of the testator could not be removed by subsequent legislation, which can only be prospective in its operation.
First Congregational Church of New Orleans v. Henderson, 209.
 10. One who has accepted a remunerative legacy, will be bound by the acceptance. If he considered himself entitled to claim a larger sum for his services, he should have renounced the legacy, and have claimed as a creditor.
Succession of Cucullu, 397.
 11. The deceased bequeathed to the mother of his natural children certain lots of ground, "*pour en jouir sa vie durant, reversible après elle à mes enfans naturels alors existans, ou à leurs représentans.*" *Held*, that this was no substitution, but a bequest of the usufruct to the mother, and of the property to the children, allowed by art. 1509 of the Civil

Code ; and that the rights of the latter vested at the opening of the succession of the testator, and not at the death of the mother.

Succession of Ducloslange, 409.

12. Unless the will necessarily presents a substitution, and can be understood in no other manner, the disposition will be sustained. *Ib.*

13. No right of action can accrue from a verbal disposition *mortis-causa*. C. 1583, 1589. *Rost v. Henderson*, 468.

DOTAL PROPERTY.

See HUSBAND AND WIFE.

EMANCIPATION OF SLAVES.

1. A bequest by which the testator directs that certain slaves shall be given to his legatees, to serve them until such slaves attain a certain age, when they are to be emancipated, is not a *fidei-commisum*. The emancipation is a donation to the slaves of their value, to be received at a future and fixed period ; and the usufruct, or hire of them in the meantime, is a legacy to those in whose favor it is made. *Nimmo v. Bonney*, 176.
2. Where slaves are directed by a testator to be immediately emancipated by his executors, the heirs of the deceased will be entitled to retain them in their possession, and to enjoy their services, until they can be legally emancipated. *Ib.*
3. Action by the heirs against the executors to recover the possession of certain slaves until they can be legally emancipated, in compliance with the will of the testator and the value of their services from the death of the ancestor : *Held*, that the petitioners having proved their heirship only on the trial of the cause, the executors, who were rightfully in possession of the slaves and bound to keep them, are not accountable for the value of their services. *Ib.*

ERROR.

1. A payment made in error may be recovered back, where such error, though the fault of the plaintiff, has not injured the party to whom the payment was made. *Massias v. Gasquet*, 137.
2. A contract or payment made for the purpose of avoiding litigation, cannot be rescinded for error of law. C. C. 1840. *Urquhart v. Gove*, 207.

See APPEAL, 21.

EVIDENCE.

- I. *General Rules of Evidence established by Chap. 6, Title IV., Book III. of the Civil Code.*
- II. *Right of Party to introduce Evidence.*

- III. *When Evidence must be introduced.*
- IV. *Onus Probandi.*
- V. *Presumption.*
- VI. *Admissions.*
- VII. *Matters Judicially Noticed.*
- VIII. *Competency of Witness.*
- IX. *Commissions to take Testimony.*
- X. *Judicial Records and Proceedings, and Copies thereof.*
- XI. *Non-Judicial Records and other Public Instruments, and Copies thereof.*
- XII. *Private Writings.*
- XIII. *Loss or Destruction of Writings.*
- XIV. *Proof of Contracts, not in writing, over five hundred dollars in value.*
- XV. *Admissibility of Parol Evidence to prove Fraud or Simulation.*
- XVI. *Inadmissibility of Parol Evidence to prove Title to Real Property.*
- XVII. *Secondary Evidence.*
- XVIII. *Irrelevant Evidence.*
- XIX. *Evidence in Particular Actions.*
 - 1. *In Actions of Nullity or Rescission.*
 - 2. ——— *against Partners.*

I. *General Rules of Evidence established by Chap. 6, Tit. IV, Book III. of the Civil Code.*

- 1. The general rules of evidence established by the Civil Code, book III, tit. IV, ch. 6, arts. 2229 to 2270, are applicable to all contracts whatever.
Johnson v. Marshall, 157.

II. *Right of Party to introduce Evidence.*

- 2. Injunctions, arresting summary proceedings, apparently authorized by the parties, are required by the Code of Practice, (arts. 740, 741, 751, 756,) to be tried summarily; but the parties cannot be deprived of any of the means of procuring evidence, within a reasonable delay. *Slidell v. Rightor, 59.*

III. *When Evidence must be introduced.*

- 3. Evidence not produced on the trial below, cannot be brought before the Supreme Court on appeal. *Smelser v. Williams, 152.*

IV. *Onus Probandi.*

4. Where a party's right to recover depends on an act to be done by him, he must show an actual tender and refusal, or that every thing has been done by him, which could be done, to give effect to the contract.
Gilbert v. Cooper, 181.
5. The execution of a note raises a presumption that a just consideration has been given for it ; and the maker who pleads error or failure of consideration, must show it : but where one partner is sought to be made liable on a note given by the other, and he alleges fraud and want of consideration, and shows circumstances somewhat suspicious, the burden of proving the consideration will be on the plaintiff. *Harrison v. Poole*, 193.
6. A general denial will place the *onus* of proving notice of protest on the plaintiff, who must establish that such notice was sent to the post office, nearest to defendant's residence, whether in the same or another state ; and the latter may, under the general issue, show that the office to which it was sent was not the nearest. *Pollard v. Cook*, 199.
7. As a general rule no one will be presumed to have paid what he was not bound for ; and where he reclaims an amount so paid, the burden of proving that he was neither legally nor morally bound therefor, will be on him.
Urquhart v. Gove, 207.
8. On a rule against the sureties on a bail bond, (taken under the act of 28 March, 1840, supplementary to another act approved on the same day,) conditioned that the principal shall not depart from the State for the term of three months without leave of court ; or, in case of such departure without leave, that the sureties shall pay the amount for which definitive judgment may be rendered, the plaintiff must show that the principal has left the State within the three months in violation of the bond, or he cannot recover.
Phillips v. Hawkins, 218.
9. Where the evidence is so contradictory, that the court cannot determine to whom the property in dispute belongs, the plaintiff must be nonsuited.
Turner v. Lockwood, 444.

See HUSBAND AND WIFE, 14.

V. *Presumption.*

10. Where a married man removes to this State from one in which the common law, except so far as modified by statute, prevails, by which the personal property of the wife vests in the husband by the marriage, and where slaves are movables by law, any slaves or other personal effects brought by him will be presumed to have belonged to him. It will be for the wife, or third persons, to destroy the presumption, by proof of title in themselves.
Penny v. Weston, 165.
11. A substitution is never presumed. Unless the will cannot be understood otherwise it will be maintained. *McCluskey v. Webb*, 201.
12. The provision of the tenth section of the act of 28th March, 1840, abolishing imprisonment for debt, that the failure by a debtor "to pay over mo-

ney received, or collected for, or deposited with him for another " shall be held presumptive evidence of fraud, cannot be applied to the case of a partner who has received and refuses to pay over money belonging to the partnership, and who is not liable for any specific sum, but only to account as a managing partner. It applies to those only who, having received money for another, without authority to dispose of it, failed to pay it over to the right owner. *Hanna v. Auter*, 221.

13. In the absence of any expression of legislative will, proof of its being the commercial custom of a particular place as to certain articles, to take back the whole lot sold, and to restore the price on the discovery of any portion being defective, would be entitled to some weight, if shown to have existed long enough to have become generally known, and to warrant the presumption that contracts were made in relation to it; but where the law has provided a rule, no customs of any set of men can have a force paramount to the law. *Ledoux v. Armor*, 381.

14. Where the purchaser at a Sheriff's sale, shows a judgment, execution, and sale, the presumption *omnia recte acta*, will arise in his favor. It is for the opponent, who seeks to annul the sale, to destroy this presumption, by proof of such irregularities as must vitiate the proceedings.

New Orleans Gas Light and Banking Company v. Allen, 387.

VI. Admissions.

15. The rule that a party, wishing to avail himself of the admissions of his adversary, cannot divide them, but must take them entire, does not apply to admissions in the pleadings; but only to answers to interrogatories, (C. P. art. 356,) or to judicial confessions made according to art. 2270 of the Civil Code. Thus, where the debt is acknowledged, but a tender of the amount alleged, the plaintiff will be exempted from the necessity of proving his claim; but as a matter of defence, the tender must be established by legal evidence, like any other fact tending to show a discharge from the obligation sued on. *Small v. Zacharie*, 144.

16. Plaintiff cannot contradict by parol evidence, an act of mortgage on which he sues, or prove any thing beyond it. *Hill v. Hall*, 416.

17. Action for the price of certain articles of furniture, and answer that plaintiff had sold the furniture to a third person, from whom defendant had purchased it. Bills made out in the name of such third person, and receipts for notes given in payment by him as so much cash, were produced by defendant. Plaintiff having offered to introduce witnesses to prove that the sale was made to defendant, the latter objected to the admission of the evidence as contradicting the proof under the plaintiff's own hand; and on the ground, that the petition did not aver that the sale was made for her use. *Held*, that the evidence was inadmissible; and judgment of nonsuit.

Lyons v. Jackson, 465.

VII. Matters Judicially Noticed.

18. Post offices in the United States are established by law; and no evidence is required of what the law is. *Pollard v. Cook*, 199.

VIII. *Competency of Witness.*

19. In an action for the price of certain timber, defendant having alleged that he purchased it from a third person who had it in possession, plaintiff offered the evidence of a witness, taken under a commission, who deposed, that being entrusted with the timber by plaintiff, he had, without authority, delivered it to the person from whom defendant obtained it. The admission of the evidence was opposed on the ground that the witness, who was the agent of the plaintiff, had a direct interest in the result, as he would be responsible to the latter, in the event of his losing the suit, in consequence of having exceeded his authority. *Held*, that the evidence was admissible.

Marks v. Landry, 31.

20. The fact of being a creditor of a party to a suit, does not disqualify a witness from testifying on his behalf. *Lard v. Strother*, 95.

21. The act of 27th March, 1823, so far as it renders the maker of a note, bill of exchange, or other negotiable paper incompetent, under any circumstances, as a witness in an action against an endorser, was repealed by art. 3521 of the Civil Code. *Johnson v. Marshall*, 157.

22. In an action to recover a sum paid out by the bankers of the plaintiff on a check alleged by the latter to have been forged, the testimony of a witness, taken under commission, declaring that he forged the check, will be admissible; the objection resulting from his confession, going to his credit, rather than to his competency. Even a verdict of guilty, not followed by judgment, is not sufficient to establish the infamy of the witness, and render him incompetent. *Laborde v. The Consolidated Association of Louisiana*, 190.

IX. *Commissions to take Testimony.*

23. Under the 17th section of the act of 20th March, 1839, commissions to take testimony may be taken out by either party, at any time after service of petition and citation; and it will be no objection to the admissibility of the evidence, that it relates to facts not then at issue, nor alleged in the petition. *Mayo v. Savory*, 1.

24. Defendants having obtained an order of seizure and sale on a judgment rendered in another State, plaintiff became the purchaser of his own property at a twelve months credit, for the price of which he gave a bond in conformity to law. Previous to its becoming due, he obtained an injunction to prevent defendants from issuing any execution on it, and procured the appointment of a curator *ad hoc*, to represent the defendants, who resided in another State. A commission to take testimony having been taken out by plaintiff, he caused the interrogatories to be served on the curator *ad hoc*. On an objection to the admission of the depositions: *Held*, that defendants having an attorney of record in the proceedings to obtain the order of seizure and sale, the case was not one for the appointment of a curator *ad hoc*; and that the interrogatories, get having been served on the defendants, or their counsel, were inadmissible. *Lard v. Strother*, 95.

25. The interrogatories to be propounded to a witness, under a commission,

were served on defendants' counsel, who declined to add any cross interrogatories, but reserved the right of having legal notice of the time of taking the answers of the witness. Notice was not given to defendants' counsel; but the commissioner certified that he gave *timely notice* to the defendants, without showing how it was given, or upon whom it was served. *Held*, that defendants having an attorney on record, who had reserved the right of notice, such notice should have been given to him, that he might be present at the taking of the testimony, and that the deposition was inadmissible. C. P. 434. *Smelser v. Williams*, 152.

X. *Judicial Records and Proceedings, and Copies thereof.*

26. Where one who certifies the transcript of a judgment from another State, styles himself in the body of the certificate, the clerk of the court, and signs it as such, all of which is attested by the seal of the court, and the certificate of the Chief Justice or Presiding Magistrate, no further evidence will be necessary to establish his official capacity. *Van Wyck v. Hills*, 140.
27. The principal object of the law requiring a public inventory to be made of all the effects, movable and immovable, of a succession or community, is to establish the existence of all the property, and to show the whole amount, or value thereof. C. C. 1098, 1099, 1100, 1101. Such an inventory is to serve us as the basis of the settlement of the estate, so far as it shows the effects belonging to it, but is not conclusive proof of the real value of the property, nor the exclusive criterion by which those who are interested, are to be charged in the partition and settlement of the estate. Save where the law has declared in positive terms that the property inventoried shall be taken at the estimated value, such estimation is not conclusive.

Babin v. Nolan, 278.

28. The statement in the return of a Sheriff on an order of seizure and sale, is *prima facie* evidence of the advertisements and appraisements required by law. *New Orleans Gas Light and Banking Company v. Allen*, 387.

XI. *Non-Judicial Records and other Public Instruments, and Copies thereof.*

29. Where the proclamation of the President, offering a portion of the public lands of the United States for sale, is produced together with patents to a purchaser at such sale, the court will not look beyond them to ascertain whether the lands had been regularly surveyed. *Combs v. Dodd*, 58.
30. A statement in the protest of a notary, that a demand of payment had been made of the maker of a note, and payment refused, is sufficient proof of an amicable demand. *Flower v. Dubois*, 78.
31. Where the laws of another State which should govern the case, are not in evidence, our own must prevail. *Van Wyck v. Hills*, 140.
32. Where the protest and certificate of notice have been made in the manner required by the act of 13th March, 1827, copies thereof certified by the notary to be true copies from the originals in his office, will be evidence of all the matters therein contained. It is not necessary that the certificate

should state that such copies were made from a record made in the presence of two witnesses. *Johnson v. Marshall*, 157.

33. The certificate of notice of the protest of a bill or note, signed by the notary alone, without the attestation of two witnesses, is insufficient. Such notice must be shown by testimony under oath, or by an official certificate in strict compliance with legal forms. *Ib.*
34. It is no objection to the introduction in evidence of an act of the Legislature of another State, extending the charter of a Bank, for the purpose of proving its existence as a corporation, that the original act of incorporation is not produced. The act offered, certainly proves *rem ipsam*—that the extension of the charter was granted. *Philadelphia Bank v. Lambeth*, 463.
35. Acts of the Legislature, or extracts from the executive minutes of another State, attested by the Secretary of State, and accompanied by a certificate from the Governor, under the great seal of the State, declaring that the person who attests them is the Secretary of State, and that his attestation is in due form, are sufficiently proved. *Ib.*

XII. Private Writings.

36. Where in an action for the partition of a succession, in which a settlement of all claims among the heirs ought properly to be gone into, an act signed by the tutrix of the minor heirs, waiving her mortgage as tutrix on a tract of land, had been given in evidence, a promissory note executed as evidence of the debt secured by the mortgage, may be received to rebut the presumption of payment resulting from the release of the mortgage.

Penny v. Weston, 165.

37. The master of a vessel cannot hypothecate her for a pre-existing debt, and the necessity for the loan must be shown to have existed at the time it was made. The bond is not evidence of this necessity, nor of the absence of other means of obtaining the money. This must be shown *aliunde*, and otherwise than by the statement of the master, who cannot acquire authority from his own assertions. *Clark v. Laidlaw*, 345.
38. The act of 18th March, 1818, creating the offices of Surveyor General and Parish Surveyor, contains nothing indicating an intention to prevent any municipal corporation within a parish, from appointing their own surveyors, or making it the duty of owners of property to employ the surveyors appointed by the State, and no other; and arts. 828, 829 of the Civil Code mainly relate to cases of dispute between adjoining proprietors as to the boundaries between their lands. Although the formalities prescribed by these articles are required to be fulfilled by a sworn officer of the State, for the purpose of fixing permanently the limits of property, it does not follow that a surveyor appointed by a municipal corporation, or any other not commissioned by the State, cannot be employed by a proprietor desirous of having his land surveyed and its limits ascertained; but such survey and fixing of limits, will not have the same binding effect upon his neighbor, as if made by the Parish Surveyor, nor will the *procès verbal* prove itself, or obtain full faith in the courts of this State. *Buisson v. Grant*, 360.

39. Action by the executor for the price of one-third of a certain lot purchased by defendant, at the probate sale of the property of the deceased; the petition alleging, that the lot belonged jointly and equally to the deceased, the defendant, and a third person, though the title was in the name of defendant; and, that it was sold at the sale of the succession by consent of all parties. Answer, that though it appeared by a counter-letter, that he, defendant, owned only one-third; that he purchased from the deceased, and was to sell the same, and account to the deceased and the third joint proprietor, each for one-third, yet that a fourth party had been a joint owner with the deceased; that he, defendant, had endorsed notes to enable the deceased to purchase the interest of such fourth party, which he, defendant, had, after renewal, to pay, owing to the insolvency of the deceased; and that the title to the whole lot was made to him by deceased, to secure him against his endorsement, and the counter-letter executed by him, in consequence. Plaintiff having produced, under a rule taken on him, the original notes drawn by the deceased and endorsed by defendant, the books of the deceased, and other memoranda in his possession relative to the sale, a counter-letter between the deceased and the fourth party, showing the interest of the latter, and their accounts with each other; defendant offered them in evidence to sustain the allegations of his answer. Plaintiff objected to their being received, on the ground that the notes were not mentioned in the counter-letter signed by defendant. *Per Curiam*: Though the counter-letter does not speak of the notes, or of the interest of such fourth party, evidence is admissible to prove such interest, when it consists of other written documents in the possession of the deceased. Such documents do not contradict the counter-letter, but show another contract connected with the first, in relation to the same transaction, in which all were partners. Nor can the evidence be excluded on the ground that the defendant, sued as a purchaser at the sale of the succession, cannot plead in compensation, a debt due to him by the deceased. It is clearly not a question of compensation in the ordinary sense of the word. *Blanchard v. Lockett*, 370.
40. Receipts signed by a third person in his own name, and not shown to be connected in any way with the defendants, are inadmissible in evidence against them. *Farias v. De Lizardi*, 407.
41. It appeared from a copy of a lease offered in evidence, that changes had been made in the original instrument, which were indicated in the margin, but not signed by the parties. *Held*, that until all parties had approved of the proposed changes, the contract was not valid, and consequently inadmissible. *Macarty v. Lepaullard*, 425.

XIII. Loss or Destruction of Writings.

42. Where the affidavit of the plaintiff of the loss of the instrument sued on, has been read without objection, parol evidence may be admitted to prove its contents. *Adams v. McCauley*, 184.

XIV. Proof of Contracts, not in Writing, over five hundred dollars in value.

43. Where a judgment by default has been obtained on a claim exceeding five hundred dollars, it may be confirmed on the testimony of a single witness, the fact of the debt not being denied being a corroborating circumstance. The possession of the note sued on, may be also viewed as a corroborating circumstance. *Leeds v. Deblys*, 257.
44. The exceptions made by arts. 244, 245, and 246 of the third title of the third book of the Code of 1808, to the rule laid down in art. 243 of the same title and book, as to the proof of contracts which may be appraised in money, exceeding five hundred dollars in value, are virtually repealed by the Civil Code of 1825. C. C. 2257. *Rost v. Henderson*, 468.

XV. Admissibility of Parol Evidence to prove Fraud or Simulation.

45. A. had two children by his wife, who, after his death, married B., by whom she also had children, and B. became the tutor of the children of the first marriage. B. having died, C. was appointed tutor to the issue of both marriages, and after the majority of the children by the first husband, presented his accounts to the Court of Probates, both as their tutor, and as tutor of the minor heirs of their first tutor. On an opposition to the approval of the account made by the heirs of the first marriage, claiming the proceeds of a tract of land, included in an inventory made after the death of the wife, of the community which existed between her and her second husband which had been adjudicated to the latter as property common between him and his children, and which, after his death, was sold as belonging to his succession, it was proved that the land belonged to the father of the opponents before his marriage. The land was claimed by the heirs of B., under an act of sale executed by A. to D., from whom they derived title. D. being sworn as a witness testified, that the land had been conveyed to him by A., but that he had never paid any part of the price, nor taken possession of the land, there being an understanding between A. and himself, that he should reconvey the land when required; that after A.'s death, in consideration of receiving back a note he had given for the price from B., he conveyed the land to B. and his wife, believing that thereby the legal title thereto would be vested in the heirs of A. The tutors excepted to the admissibility of this evidence, on the ground that A. having been a party to the sale to D. the opponents, his heirs, cannot, any more than he could, prove its simulation, without producing a counter-letter. *Per Curiam*. If such a letter had been taken by A., as the evidence renders probable, it must have fallen into the hands of B. their tutor, and the very person who they allege attempted to defraud them. Under such circumstances they should, perhaps, be permitted to prove the simulation by parol.

Tutorship of Hackett, 290.

46. As a general rule, written titles are conclusive between the parties, and

they are estopped from contradicting them; but third persons, not parties to an act, may prove its simulation by parol, or that an act purporting to be a sale, was in truth a *dation en payement* for the benefit of such third persons, and this especially where fraud is alleged. *Ib.*

47. Art. 2256 of the Civil Code, which forbids the introduction of evidence against, or beyond what is contained in public acts, does not apply to contracts made *in fraudem legis*. A party may show by parol the real nature of such contracts.

Firemen's Insurance Company of New Orleans v. Cross, 508.

48. A wife, who had mortgaged her paraphernal property to secure the payment of a loan, which was received by her husband, and did not enure to her benefit, though appearing alone in the contract, as having borrowed the amount with the authorization of her husband, may show by parol the real character of the transaction, and exonerate herself. *Ib.*

XVI. Inadmissibility of Parol Evidence to prove title to Real Property.

49. Parol evidence is inadmissible to prove a sale of real estate.

Smelser v. Williams, 152.

50. On an opposition to an account rendered by a tutor, a witness will be allowed to prove that the tutor told him that he had sold a slave belonging to his ward for a certain sum. *Per Curiam*. The testimony does not go to make out a sale or transfer of a slave, or to affect the title to one, but to establish the receipt of money by the tutor for property disposed of by him for which he must account. *Tutorship of Hackett*, 290.

XVII. Secondary Evidence.

51. Secondary evidence will only be admitted, where the absence of better has been sufficiently accounted for. *Lard v. Strother*, 95.

52. Where the object is to prove the existence of a corporation in another State, it is no objection to the admissibility of the testimony of a witness offered to prove that he had corresponded with the corporation, that the act of incorporation would be better evidence.

Philadelphia Bank v. Lambeth, 463.

XVIII. Irrelevant Evidence.

53. On a rule to show cause, why a writ of provisional seizure should not be set aside, evidence will be inadmissible to establish facts, alleged as grounds for the rule, which belong to the merits of the case, or relate to the truth of the affidavit, which no law authorizes the defendants to disprove.

McCarty v. Lepaullard, (2d case,) 425.

XIX. Evidence in particular Actions.

1. In Actions of Nullity or Rescission.

54. To annul a mortgage on the ground that it was executed *in tempo inhabil*, and intended to secure to the mortgagee an illegal preference over the other

creditors, it is not enough that the fact of insolvency be shown; knowledge of it must be brought home to the mortgagee. C. C. 1973, 1979, 1980. And the action to annul must be brought within one year from the date of the mortgage. Ib. 1982. *Barrett v. His Creditors*, 408.

2. In Actions against Partners.

55. Where the fact of a partnership is clearly shown, and that the bills of exchange sued on were drawn for the purpose of carrying on the business contemplated by the parties, plaintiffs will not be required to show, that they knew of the existence of the partnership when they took the bills.

Robertson v. De Lizardi, 300.

56. The publication in a newspaper by a third person, that he is a member of a commercial partnership, cannot be considered as an act emanating from any of the partners and giving credit to such person, unless knowledge of the publication be brought home to the partner sought to be charged. To render the latter responsible for the acts of such third person, it must be proved that credit was given to the partner, and that he tacitly acquiesced therein. Nor will the payment by the firm of acceptances by such third person made in their name, prove any thing against such partner, where it is shown that he was absent from the place of business of the firm until after its dissolution. *Fearn v. Tiernan*, 367.

EXCEPTION.

See PLEADING, 15, 17, 18, 19, 21, 22.

EXCEPTIONS, BILL OF.

One who excepts to the opinion of an inferior court, must place on the record whatever may be necessary to enable the Supreme Court to come to a decision. *Kees v. Lefebvre*, 15.

EXECUTOR.

See DONATIONS MORTIS CAUSA, 5. SUCCESSIONS.

EXECUTORY PROCESS.

1. By the common law, where no execution has been taken out on a judgment for a year and a day, the judgment creditor may render his judgment executory, either by a *scire facias*, or an ordinary suit within twenty years. The remedy is cumulative. By the laws of this State where a judgment has the force *rei judicatæ* he may either obtain an order of seizure and sale, or bring an ordinary suit. C. P. 746, 748. *Pillet v. Edgar*, 274.
2. No execution can be issued in this State on a judgment rendered in another State which has ceased to be executory there, in consequence of no execu-

- tion having been taken out within a year and a day after it was rendered. The courts of this State cannot enforce a judgment, which the court of the State in which it was rendered, cannot execute. *Ib.*
3. The purchasers of property subject to a mortgage with the *pact de non alienando*, are not entitled to notice of an order of seizure and sale. The property is liable to be sold as if still in possession of the original mortgagor. *New Orleans Gas Light and Banking Company v. Allen*, 387.
 4. The statement in the return of a Sheriff on an order of seizure and sale, is *prima facie* evidence of the advertisements and appraisements required by law. *Ib.*
 5. Defendant executed a mortgage on a slave to secure the payment of a note given to plaintiff, the act stipulating that the mortgagor should, on paying a part be entitled to renew the note for the balance, for a limited time, but there was no provision extending the mortgage to the new note. There was a part payment, and renewal for the balance; plaintiff giving up to defendant the original note. Plaintiff afterwards presented the second note to the notary, and obtained from him a certificate that the original note had been presented to him, that plaintiff had declared that he had received the part payment and taken the second note in renewal, and that he, the notary, had *paraphed* it for the purpose of identifying it with the transaction. This certificate was not recorded at the Mortgage Office. Defendant sold the slave, under a certificate from the Recorder of Mortgages, that a mortgage existed on the slave to secure the payment of the first note. On an opposition by the purchaser to an order of seizure and sale taken out by plaintiff: *Held*, that the mortgage did not extend to the renewed note; that the purchaser was not bound to look beyond the certificate of the Recorder of Mortgages; that plaintiff by surrendering the original note, without taking any steps to give notice to third persons of the mortgage claimed for his new note, gave the purchaser reason to believe that the original note and the mortgage were both extinguished; that nothing connects the second note with the mortgage; and that neither the note, nor the certificate of the notary, are such authentic evidence as authorize the issuing of an order of seizure and sale.

Levistone v. Bona, 459.

6. Proceedings under an order of seizure and sale, cannot be arrested by a rule to show cause. Art. 739, *et seq.*, of the Code of Practice, point out the mode in which opposition to executory process may be made by the defendant in it, and art. 391, *et seq.*, of the same Code, and other laws, the means by which third persons may protect their rights.

Minot v. Bank of the United States, 490.

FIDEI-COMMISSA.

See DONATIONS MORTIS CAUSA, 7.

FIERI FACIAS.

1. A Sheriff must, at his peril, avoid seizing under execution property not belonging to the defendant. It is not enough that he should presume, even on strong grounds, that it belongs to the latter ; he must know it.
Duperron v. Van Wickle, 39.
2. One whose property is illegally seized under an execution against another person, is not bound, on being informed thereof, to give any notice to the Sheriff. He may, at once, seek relief by suit ; unless, to avoid costs, he choose to make an amicable demand. And where the property has been sold by the Sheriff, he will be entitled to recover, not the price at which it was sold, but its real value at the time. *Ib.*
3. In an action by a third person, against the Sheriff and plaintiffs in execution, for the value of property belonging to such third person, illegally seized and sold, and the proceeds of which had been applied in satisfaction of the execution, it will be no defence on the part of such plaintiffs that they did not authorize the seizure. They are bound to indemnify those who have been injured by the party employed to make the amount of their execution. *Qui sentit commodum, debet sentire et onus. Ib.*
4. The purchaser at a Sheriff's sale cannot refuse to pay the price he has bid, on the ground that there existed mortgages on the property of an older date than that on which he purchased, or that the legal formalities have not been complied with, unless he has been disturbed in his possession, or has just reason to apprehend that he will be. C. P. 710
Collins v. Daly, 112.
5. Where one whose property has been seized under an execution against a third person notifies the Marshal or Sheriff that the property seized belongs to him, he will not, by omitting to take legal measures to prevent the sale, lose his recourse against the officer. *Wright v. Cain*, 136.
6. Under a *feri facias* against the principal and surety on a twelve months bond, executed for the price of property sold under execution, the Sheriff may seize and sell the property of the principal, or of the surety, or of both, to the amount of the debt and costs. C. P. 719, 720.
Edwards v. Walker, 181.
7. A purchase by a deputy sheriff of property sold by himself under a *feri facias*, is absolutely null. *McCluskey v. Webb*, 201.
8. An allowance made by a Court of Probates to one for services as an auditor of the accounts of a succession, may be seized under a *feri facias*. C. P. 647. It cannot be considered as the salary of an office.
Vance v. Lafferanderie, 340.
9. Article 1987 of the Civil Code declaring what rights cannot be made liable for the payment of debts, is repealed by art. 647 of the Code of Practice, so far as they are inconsistent with each other ; under the latter the Sheriff may seize all sums of money due to the debtor in whatever right, unless for alimony or salaries of office. *Ib.*
10. The property of the principal cannot be seized under execution by a cre-

ditor, even to the extent of the consignee's privilege; the creditor of the consignee in such a case, must attach or seize the claim of his debtor in the hands of the consignor. *Montgomery v. Brander*, 400.

11. Defendants, commission merchants, having contracted to sell a quantity of cotton belonging to their principals, to a third person for cash, before payment of the price or delivery, plaintiffs seized, in the hands of such third party, under a *fi. fa.* in a judgment against defendants, all the property, rights and credits of the latter. *Held*, that the vendors not being bound to deliver the cotton until the price was paid (C. C. 2463,) nothing was seized; and that the vendee might have disregarded it, and have paid the price to defendants and received the cotton. *Ib.*

FRAUD.

See ATTACHMENT, 6. BILLS OF EXCHANGE AND PROMISSORY NOTES, 11. EVIDENCE, 45, 46, 47, 54. HUSBAND AND WIFE, 14. SALE, 9.

FOREIGN LAWS.

1. Where the laws of another State which should govern the case, are not in evidence, our own must prevail. *Van Wyck v. Hills*, 140.
2. Acts of the Legislature, or extracts from the executive minutes of another State, attested by the Secretary of State, and accompanied by a certificate from the Governor, under the great seal of the State, declaring that the person who attests them is the Secretary of State, and that his attestation is in due form, are sufficiently proved. *Philadelphia Bank v. Lambeth*, 463.

HUSBAND AND WIFE.

1. Art. 2367 of the Civil Code, after providing a legal mortgage in favor of the wife on all the property of the husband, for the reimbursement of her paraphernal property, where the husband has received the price of it, declares that she shall have a similar mortgage in case he should have disposed of her paraphernal property, in any other way, for his individual interest. The words "*or otherwise disposed of the same*" in that article refer to the paraphernal property itself, and not to its proceeds. The wife has a legal mortgage, for the reimbursement of her paraphernal funds, if the husband applies them to his own use, from whatever source he may have received them. *Johnson v. Pilster*, 71.
2. The effect of the renunciation of the community of *acquits* by a wife, is to place the husband and wife in the same situation as if no community had ever existed between them; and all property, purchased during the marriage, will be considered as having been made on the husband's account, as much so as if made before the marriage. *Ib.*
3. The wife's mortgage for the reimbursement of her paraphernal property,

attaches as completely to property acquired by the husband, during coverture, as to that he possessed before ; nor can it be inferred from the right given to him, as head of the community, to sell its effects without the consent of the wife, that, when he exercises that right, the property alienated is relieved from her mortgage. Like all other general mortgages, the wife's follows the property into the hands of the purchaser, but can only be enforced after discussing that remaining in the possession of the husband. *Ib.*

4. Art. 2367 of the Civil Code granting the wife a mortgage on all the property of her husband, for the reimbursement of her paraphernal property, where the amount has been received by the husband, or where it has been otherwise disposed of for his benefit, is not repealed by art. 3281 or 3317. *Ib.*

5. The mortgage of the wife on the property of her husband for her dotal and paraphernal rights, exists without being recorded. *Ib.*

6. Property purchased with the paraphernal funds of the wife, only becomes her separate property while she keeps the administration of her separate estate, and when the title is taken in her own name, either as a purchase with the funds which she administers herself, or as a *dation en paiement* made to her by the debtor of a separate and paraphernal debt.

Rousse v. Wheeler, 114.

7. Property purchased during marriage in the name of the husband and wife, though paid for in whole or in part by the funds of the wife, will belong to the community of *acquêts*, but subject to a charge, in her favor, for the amount by which the community may have been thereby benefitted ; and she will have, as in the case of her paraphernal funds having been used by the husband for his individual benefit, a mortgage on all his property for the reimbursement thereof. C. C. 2367. *Ib.*

8. A wife cannot bind herself, *in solido*, with her husband, for a debt contracted during the marriage, on account of the community. C. C. 2412. *Ib.*

9. An assignment by the husband of a paraphernal debt due to the wife, in payment for property purchased in the name of the community, will be valid, where, by the contract of marriage, the administration of her paraphernal property is entrusted to him ; but he will be responsible to her for the reimbursement of its amount. C. C. 2367. *Ib.*

10. Where a married man removes to this State from one in which the common law, except so far as modified by statute, prevails, by which the personal property of the wife vests in the husband by the marriage, and where slaves are movables by law, any slaves or other personal effects brought by him will be presumed to have belonged to him. It will be for the wife, or third persons, to destroy the presumption, by proof of title in themselves.

Penny v. Weston, 165.

11. Where, in an action by a married woman, the petition alleges that she is authorized by her husband to sue, she will not be bound to prove the fact, unless specially denied ; a general denial is not sufficient. Where her authority to sue is specially denied, she must establish it by evidence, before

- she can compel the defendant to answer to the merits. C. P. 327, 333, 344. *Kent v. Monget*, 172.
12. Though it is well settled that dilatory and declinatory pleas must precede the *contestatio litis*, yet if the petition disclose a total want of legal right or authority to sue in the plaintiff, it may be acted on by the court below at any stage of the proceedings, though not pleaded: as where a married woman sues in her own name, without alleging that she is authorized by her husband. Such a defect could not be cured by any waiver on the part of the defendant. *Ib.*
13. Art. 2377 of the Civil Code which provides, that when the hereditary property of either of the spouses has been increased or improved during the marriage, the other shall be entitled to one-half of the value of such increase or amelioration, if proved to have been the result of the common labor or expense, does not contemplate, that to ascertain the value of such increase or improvement, every item of improvement shall be estimated separately, and the aggregate amount added to the estimation of the land. This would often be unjust, as the increased value of the property would, in many cases, be far from equal to the original cost of such improvements. The proper course is, to estimate the value of the hereditary property according to its value at the time of the dissolution of the community, but, if possible, in the situation in which it was at the time of the marriage, and then to inquire into its real value, with all the improvements existing thereon in the condition in which it was at the time of the dissolution of the community; and the difference between the two estimates will form the increase, for one-half of which the other spouse should be compensated on the settlement of the community. *Babin v. Nolan*, 278.
14. Where a wife has obtained against her husband, a judgment for the separation of property, and ascertaining the amount of her dotal and paraphernal rights, the creditors of the latter may still require her to prove her claims contradictorily with them, whenever they have reason to suspect that the separation has been made with a view to defraud them; but they must put her on her guard by alleging fraud and collusion. Where no such allegation is made, she will not be bound to prove her claims *aliunde*, nor can the correctness of the judgment, or the sufficiency of the evidence upon which it was rendered, be inquired into. *Brassac v. Ducros*, 335.
15. To secure a debt due to mortgagee, twelve lots of ground were mortgaged by the same act, but separately and specially, each lot as security for a fixed part of the debt; and the wife of the mortgagor renounced all her rights, actions, privileges, and mortgages on them. An order of seizure and sale having been obtained, lot No. 1, sold for more than the part of the debt for which it was mortgaged, while all the others sold for less than the sums for which they were mortgaged. In a contest between the wife and mortgagee: *Held*, that the wife must be considered as having renounced her rights only to the extent of the mortgage on each lot; and that the surplus realized by the sale of lot No. 1, cannot be claimed by the mortgagee, but must be ap-

plied to the satisfaction of the rights of the wife, after deducting its proportion of the costs of the sales, calculated according to the price it brought.

Ib.

16. A wife who has renounced the community of *acquêts*, must be regarded as a third person in relation to sales of community property made during the marriage; and every thing done during the marriage in relation to the sale or alienation of property, must be viewed as done by the husband alone.

Ib.

17. Immovables settled as dowry, cannot be alienated during the marriage, except in the cases provided for by arts. 2338, 2339, 2340, 2341, of the Civil Code. C. C. 2337. But when made in conformity to law the sale is definitive and irrevocable, forever freeing them from any dotal rights of the wife. *Montfort v. Her Husband*, 453.

18. The purchaser of dotal property legally alienated, has nothing to do with the investment of the proceeds; the husband alone has the administration of the dowry. C. C. 2330. All that the purchaser has to do is to pay the price to the husband, who may act alone for the preservation or recovery of the dowry. The proceeds stand in lieu of the property itself, and become dotal. C. C. 2327. If the husband fail to reinvest the dotal funds, the wife will have a legal mortgage on his immovables, and a privilege on his movables, for their restitution. C. C. 2355, 3287. *Ib.*

19. A wife, who has mortgaged her paraphernal property to secure the payment of a loan, which was received by her husband, and did not enure to her benefit, though appearing alone in the contract, as having borrowed the amount with the authorization of her husband, may show by parol the real character of the transaction, and exonerate herself.

Firemen's Insurance Company of New Orleans v. Cross, 408.

20. Under no circumstances can a wife become surety for her husband. The form of the contract will be disregarded. Those who treat with married women, must see that the obligations they contract turn to their advantage.

Ib.

INJUNCTION.

1. Where an injunction has been obtained to stay proceedings under writs of *fi. fa.* issued at the suit of different parties, the latter will be entitled to sever in their defence, though the Sheriff may have levied on the same property to satisfy all the writs. *Borne v. Porter*, 57.
2. A District Court cannot arrest, by injunction, process issued from a Parish Court. *Ib.*
3. Injunctions, arresting summary proceedings, apparently authorized by the parties, are required by the Code of Practice, (arts. 740, 741, 751, 756,) to be tried summarily; but the parties cannot be deprived of any of the means of procuring evidence, within a reasonable delay. *Slidell v. Rightor*, 59.

INSOLVENCY.

1. Where the funds of an insolvent estate have remained on deposit in a bank, in which they were placed by the syndic in pursuance of law, any loss resulting from the depreciation of the notes of the bank, must be borne by the creditors; but where the funds so deposited were withdrawn by the syndic, without any order of court, when the notes of the bank were *at par*, and were re-deposited when depreciated, he will be made to account to the creditors for the value of the notes *at par*. He should have left the funds on deposit, until ordered to pay them out. Act of 13th March, 1837.
Montilly v. His Creditors, 142.
2. No appeal will lie, under ordinary circumstances, in favor of the syndic of the creditors of an insolvent, from an order to produce his bank book.
Perrault v. His Creditors, 396.
3. To annul a mortgage on the ground that it was executed *in tiempo inhabil*, and intended to secure to the mortgagee an illegal preference over the other creditors, it is not enough that the fact of insolvency be shown; knowledge of it must be brought home to the mortgagee. C. C. 1973, 1979, 1980. And the action to annul must be brought within one year from the date of the mortgage. *Ib.* 1982. *Barrett v. His Creditors*, 408.
4. Where one who has acted as curator of a succession, and failed to pay over funds which came into his hands as such, makes a voluntary surrender of his property to his creditors, under the act of 20th February, 1817, the surety on his bond as curator may oppose his surrender. C. C. 3026. The failure or neglect of a creditor to oppose the surrender, cannot operate a release of the surety. *Per Curiam*: The effect of the surrender was only to discharge the debtor from imprisonment; it did not release him from the payment of his debts. *Cougot v. Fournier*, 420.
5. Where, in an action to rescind a sale, on the ground that it was made with the view of giving a preference to certain creditors of the vendor, who is stated to be insolvent, the petition does not allege that the purchasers knew that their vendor was insolvent, and that the latter had not property sufficient to pay the debt of the petitioner, the sale cannot be avoided.
New Orleans Gas Light and Banking Company v. Currell, 438.
6. Art. 1982 of the Civil Code is applicable exclusively to a particular class of cases, in which the only alleged ground of nullity is, an undue preference given to one of the creditors of an insolvent; while art. 1989 applies to all other contracts by which creditors are injured. *Ib.*

INSURANCE.

1. A consignee with power to sell, has an insurable interest; and if the consignor afterwards assent, he will be responsible for the premium, and be entitled to the benefit of the policy.
Pouwerin v. Louisiana State Marine and Fire Insurance Company, 234.
2. Where a vessel insured from New Orleans to Vera Cruz, on her way

through Lake Borgne, touches at the Bay of St. Louis for the purpose of procuring a pilot to conduct her through Pass Christian, it will not be a deviation. *Ib.*

INTERPRETATION.

1. Prior laws are repealed by subsequent ones, only in case of positive enactment, or clear repugnancy between their provisions. This rule established in relation to laws enacted at different periods, applies with greater force to the several parts of a code adopted about the same time.

Johnson v. Pilster, 71.

2. The seller is bound to explain himself clearly respecting the extent of his obligations; and any obscure or ambiguous clause will be construed against him. C. C. 2449. *Phillipi v. Gove*, 315.

INTERVENTION.

See APPEAL, 4. MINOR, 6.

JUDGMENT.

1. Every final judgment must be signed separately by the judge, after having been read in open court. C. P. 546. Until signed, it is not final. The signature must bear a precise date, as it would be otherwise impossible to ascertain from what day the mortgage, resulting therefrom when recorded according to law, would take effect. The signature of the minutes of the court, required to be kept by art. 777 of the Code of Practice, is not such a signature of the final judgments rendered by it as the Code requires. This signature of the minutes is merely to attest the correctness of the entries made by the clerk. *Ex parte Nicholls*, 52.
2. The execution of an act under private signature, by the purchaser of property at a succession sale, resold by order of the Probate Court on his failure to comply with the terms of sale, by which he consents to lease or buy the property from the second purchaser, is an acquiescence in the judgment divesting his title. *Landry v. Connely*, 127.
3. No appeal or action of nullity will lie against a judgment, which has been voluntarily executed by the party against whom it was rendered. C. P. 567, 612. *Ib.*
4. In joint actions all the debtors must be sued, and must remain in court till the end of the suit; and the judgment must be against each for his virile portion. *Van Wyck v. Hills*, 140.
5. Where the answer admits that a portion of the amount claimed is due, judgment may be obtained therefor, on motion, without a trial; and the case be left open, as to the part in dispute. *Small v. Zacharie*, 144.
6. Defendants admitting a part of the debt sued for to be due, pleaded a tender; and plaintiff having moved for a judgment for the amount so admitted,

it was rendered without a trial, for that sum, with costs, leaving the case open as to the balance of the claim: On appeal, *held*, that as to the costs, the judgment was premature; that being thrown by law on the party cast, they should not be taxed before the final determination of the suit; and that, should defendants prove the tender, and establish the other part of their defence, the costs must fall upon the plaintiff. *Ib.*

7. The validity of a judgment ordering the execution of a will, cannot be inquired into collaterally. *McCluskey v. Webb*, 201.
8. By the common law, where no execution has been taken out on a judgment for a year and a day, the judgment creditor may render his judgment executory, either by a *scire facias*, or an ordinary suit within twenty years. The remedy is cumulative. By the laws of this State where a judgment has the force, *rei judicata*, he may either obtain an order of seizure and sale, or bring an ordinary suit. C. P. 746, 748. *Pillet v. Edgar*, 274.
9. No execution can be issued in this State on a judgment rendered in another State which has ceased to be executory there, in consequence of no execution having been taken out within a year and a day after it was rendered. The courts of this State cannot enforce a judgment, which the court of the State in which it was rendered, cannot execute. *Ib.*
10. Where a wife has obtained against her husband, a judgment for the separation of property, and ascertaining the amount of her dotal and paraphernal rights, the creditors of the latter may still require her to prove her claims contradictorily with them, whenever they have reason to suspect that the separation has been made with a view to defraud them; but they must put her on her guard by alleging fraud and collusion. Where no such allegation is made, she will not be bound to prove her claims *aliunde*, nor can the correctness of the judgment, or the sufficiency of the evidence upon which it was rendered be inquired into. *Brassac v. Ducros*, 335.

JUDGMENT BY DEFAULT.

Where a judgment by default has been obtained on a claim exceeding five hundred dollars, it may be confirmed on the testimony of a single witness, the fact of the debt not being denied being a corroborating circumstance. The possession of the note sued on, may be also viewed as a corroborating circumstance. *Leeds v. Debuis*, 257.

See APPEAL, 18, 19.

JURY.

See COURTS, 7. PARTNERSHIP, 13.

LEASE.

1. Article 43 of the Code of Practice, which provides if the farmer or lessee of real estate be sued in any action, involving the title to real property, or

any immovable right to such property, "that he shall declare to the plaintiff the name and residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and must defend it in the place of the tenant, who shall be discharged," applies only where the lessor or owner of the property sued for resides in the State, or, being absent is represented therein; if the lessor reside out of the State, and is not represented therein, the lessee must defend the suit in his absence.

Plummer v. Schlatre, 29.

2. The privilege of the lessor on the movables found in the house, yields to that for the funeral expenses of the debtor and family, where there is no other source from which they can be paid; but it must be placed on the tableau of distribution immediately after such expenses.

Succession of Devine, 366.

3. Plaintiff leased from defendant an hotel, "with all the appurtenances, and all the household furniture and fixtures belonging to the same." The hotel was supplied with gas fixtures; but on application to the Gas Company, they refused to permit the introduction of any gas, on the ground that an amount was still due for gas supplied to a former tenant for which defendant was responsible, and that, according to their rules, no gas could be supplied to the building until the arrears were paid. Defendant having refused to pay the whole amount claimed by the company, a suit was pending to recover it. *Per Curiam*. The lease entitled plaintiff to call on the company for gas, on offering to pay for it; but nothing shows that defendant bound himself that such supply should be furnished. If the gas was improperly refused, plaintiff's remedy was against the company. The defendant caused him no injury by exercising his right of resisting a claim which he deemed illegal. *Scudder v. Paulling*, 428.
4. The omission of a lessor to make the necessary repairs to the premises, will not, where the rent is sufficient to enable the tenant to make them, authorize the rescission of the lease, or a suit for damages. Under art. 2664 of the Civil Code, the lessee may, on the refusal or neglect of the lessor, himself cause them to be made, and deduct the cost from the rent due, on proving that the repairs were indispensable, and the price paid by him just and reasonable. *Id.*

LEVEES.

See ROADS AND LEVEES.

LIMITS, FIXING OF.

See SALE. 1. SURVEY.

LOAN.

Defendants, who were merchants, delivered to the plaintiffs, money brokers,

a certain sum in notes of the Bank of the United States, and received from the latter another sum in Louisiana Bank notes, with the understanding, that either party should be entitled to demand the return of a like amount of such notes as were originally delivered by them, on giving certain notice to the other. Plaintiffs, having offered to return the amount of notes received by them, after giving the notice agreed upon, demanded those which they had delivered to defendants; and, on the failure of the latter to restore them, notified them, that unless the amount was returned by a given time, they, (plaintiffs,) would sell the United States Bank notes for what they would bring in the market, and hold defendants responsible for the difference between the proceeds, and the value of the notes received by them. Plaintiffs sold the notes through a broker, and purchased them themselves, and sued for the difference. *Held*, that the real character of the transaction is one of mutual loans for consumption—an agreement by the parties to deliver to each other a certain number of bank notes to be used by them respectively, under the obligation of returning an equal amount of the same kind: that plaintiffs had no right to sell the notes as they did, nor to purchase them themselves; that on defendants' refusal to receive the notes, plaintiffs should have deposited them in some safe place, at the risk of the former, and have proceeded to recover the amount of notes delivered by them, under the provisions of arts. 2892 and 2893 of the Civil Code, at their value on the day when defendants should have restored them, according to the stipulations of the original agreement as to notice.

Egerton v. Buckner, 346.

LOST WRITINGS.

See EVIDENCE, XIII. PLEADING, 1.

LOUISIANA.

See TREATY OF PARIS.

MANDAMUS.

1. The writ of mandamus is given to the Supreme Court to enable it to command inferior courts to act, where delay would produce damage and injustice. *State v. Judge of the Commercial Court of New Orleans*, 48.
2. Where an inferior judge refuses to try a cause at issue between the parties, on the ground that others unknown, may be interested, and should be made parties, a mandamus will be granted to compel him to proceed. If those who are interested and informed of the proceedings, do not appear to protect their rights, they must bear the consequences; and those who are neither parties nor privies to the proceedings cannot be affected by the judgment. *State v. Judge of the Commercial Court of New Orleans*, 227.

MARSHAL.

See QUASI OFFENCES.

MINOR.

1. Silence for seventeen years, after the age of majority, will be considered a tacit ratification of the acts of the minor. The longest period of prescription for such acts is ten years. C. C. 2218. *Lea v. Myers*, 8.
2. Decision in the case of *The State v. The Judge of the Court of Probates of New Orleans*, 2 Robinson, 418, affirmed.

State v. Judge of Probates of New Orleans, 84.

3. Minor heirs, who have not accepted, must be considered (saving their right to accept at a future time,) as strangers to the succession.

Leonard v. Fluker, 148.

4. Under the provision of the Code of 1808, book 3, title, 1, art. 74, which declares that "until the acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect the deceased, who was the owner of the estate," prescription ran against a vacant succession, although minors were interested. *Ib.*
5. A change in the law by which prescription was allowed to run, under certain circumstances, against minors, will not deprive one interested in pleading it, of the benefit of the time elapsed before the repeal of the old law. The time so elapsed may be added to that since the majority of the party, to make out the necessary period of prescription. *Ib.*
6. Where the accounts of the tutor of a minor heir, presented to the Court of Probates for approval, are opposed by the latter, a co-heir may intervene in the proceedings, for the purpose of obtaining from their common tutor a legal settlement of their ancestor's estate. The cause of action is the same, and both claim in the same right. C. P. 389, 390.
Tutorship of Hackett, 290.
7. A minor who, after becoming of age, has accepted the accounts of his tutor and given him a receipt in full and discharge from all claims, may, within four years after her majority, institute a direct action against him respecting the acts of the tutorship, or oppose his discharge when applied for by him; and she will be relieved, on proof that she acted in ignorance of her rights. C. C. 355, 356, 1815, 1841. *Ib.*
8. Where the tutor of a minor, also the tutor of the minor heirs of a former tutor of the same minor, tenders in the Court of Probates, in his double capacity, his account to his late ward after his majority, it will be no objection, on an opposition by the latter, claiming a tract of land, or its proceeds omitted in the account, and alleged by the tutor to belong to the community which existed between the former tutor and the mother of the other minors, that the judgment, if in favor of the opponent, would be in substance against the heirs of such former tutor, who are not parties to the proceedings, and that the question is one of title, not within the jurisdiction of the Probate

Court. The minor heirs of the first tutor are represented by their tutor, the only person authorized by law to represent them; and the Court of Probates is empowered to determine questions of title, arising collaterally on the trial of other matters within its jurisdiction. *Ib.*

9. On an opposition to an account rendered by a tutor, a witness will be allowed to prove that the tutor told him that he had sold a slave belonging to his ward for a certain sum. *Per Curiam.* The testimony does not go to make out a sale or transfer of a slave, or to affect the title to one, but to establish the receipt of money by the tutor for property disposed of by him, for which he must account. *Ib.*
10. Where the property of minor heirs has been illegally sold, though not bound by the proceedings, they may on coming of age ratify the sale, and claim the proceeds. *Ib.*
11. A tutor is not chargeable with more than five per cent interest per annum, on funds received by him for his minor. Act of 19th February, 1825. *Ib.*
12. A claim for a sum of money against a succession, should not be engrafted on a proceeding, the object of which is to call upon the heirs to declare whether they accept or refuse the estate. Where, under such a proceeding, the heirs of full age fail to answer whether they accept or renounce, they may be declared unconditional heirs, and liable to be sued as such. C. C. 1029. But as to minors, no judgment of any kind can be rendered against them. They can, under no circumstances, be considered as having accepted absolutely; (C. C. 346;) but must be regarded as heirs of age, accepting with the benefit of inventory. The succession should have been put under administration, as provided by art. 1040 of the Civil Code.

Picou v. Dussau, 412.

MORTGAGE.

1. The laws in force prior to the promulgation of the Civil Code of 1825, relative to the recording of mortgages in the country parishes, provided that all acts of mortgage should be recorded in the office of the judge of the parish where the mortgaged property was situated. They required no separate record of mortgages to be kept, but directed that all notarial acts, whether creating mortgages or not, should be recorded in numerical order, in the same book. Acts of 24th March, 1810, and 26th March, 1815. Hence, where an act was passed before a Parish Judge, in his notarial capacity, relative to property in his parish, no further inscription was necessary to give effect, against third persons, to the mortgage resulting from it. By the Code of 1825, the duties previously prescribed only to the Register of Mortgages in New Orleans, were extended to the Parish Judges throughout the State. C. C. 3349, 3350, 3351, 3353, 3356.

Succession of Falconer, 5.

2. It is the registry, in the manner pointed out by law, which alone gives effect to a mortgage, as against third persons; as to them, it is valid, not as it has been executed between the parties, but as it has been recorded. It

is incumbent on the creditor who claims a preference over others, to give notice of his claim, in the manner pointed out by law. If he fail to ascertain that his mortgage has been correctly registered, he must suffer for the error, saving his recourse against the recorder. Creditors are not bound to look beyond the register itself, or the certificate which the recording officers are bound to make out. C. C. 3357. *Ib.*

3. Art. 2367 of the Civil Code, after providing a legal mortgage in favor of the wife on all the property of the husband, for the reimbursement of her paraphernal property, where the husband has received the price of it, declares that she shall have a similar mortgage in case he should have disposed of her paraphernal property, in any other way, for his individual interest. The words "*or otherwise disposed of the same*" in that article refer to the paraphernal property itself, and not to its proceeds. The wife has a legal mortgage, for the reimbursement of her paraphernal funds, if the husband applies them to his own use, from whatever source he may have received them. *Johnson v. Pilster*, 71.
4. The wife's mortgage for the reimbursement of her paraphernal property, attaches as completely to property acquired by the husband, during coverture, as to that he possessed before; nor can it be inferred from the right given to him, as head of the community, to sell its effects without the consent of the wife, that, when he exercises that right, the property alienated is relieved from her mortgage. Like all other general mortgages, the wife's follows the property into the hands of the purchaser, but can only be enforced after discussing that remaining in the possession of the husband. *Ib.*
5. Art. 2367 of the Civil Code granting the wife a mortgage on all the property of her husband, for the reimbursement of her paraphernal property, where the amount has been received by the husband, or where it has been otherwise disposed of for his benefit, is not repealed by art. 3281 or 3317. *Ib.*
6. The mortgage of the wife on the property of her husband for her dotal and paraphernal rights, exists without being recorded. *Ib.*
7. Property purchased during marriage in the name of the husband and wife, though paid for in whole or in part by the funds of the wife, will belong to the community of *acquêts*, but subject to a charge, in her favor, for the amount by which the community may have been thereby benefitted; and she will have, as in the case of her paraphernal funds having been used by the husband for his individual benefit, a mortgage on all his property for the reimbursement thereof. C. C. 2367. *Rousse v. Wheeler*, 114.
8. To secure a debt due to mortgagee, twelve lots of ground were mortgaged by the same act, but separately and specially, each lot as security for a fixed part of the debt, and the wife of the mortgagor renounced all her rights, actions, privileges, and mortgages on them. An order of seizure and sale having been obtained, lot No. 1 sold for more than the part of the debt for which it was mortgaged, while all the others sold for less than the sums for which they were mortgaged. In a contest between the wife and mortgagee: *Held*, that the wife must be considered as having renounced her rights

only to the extent of the mortgage on each lot ; and that the surplus realized by the sale of lot No. 1, cannot be claimed by the mortgagee, but must be applied to the satisfaction of the rights of the wife, after deducting its proportion of the costs of the sales, calculated according to the price it brought. *Brassac v. Ducros*, 335.

9. The purchasers of property subject to a mortgage with the *pact de non alienando*, are not entitled to notice of an order of seizure and sale. The property is liable to be sold as if still in possession of the original mortgagor. *New Orleans Gas Light and Banking Company v. Allen*, 387.
10. To annul a mortgage on the ground that it was executed *in tiempo inhabil*, and intended to secure to the mortgagee an illegal preference over the other creditors, it is not enough that the fact of insolvency be shown ; knowledge of it must be brought home to the mortgagee. C. C. 1973, 1979, 1980. And the action to annul must be brought within one year from the date of the mortgage. *Ib.* 1982. *Barrett v. His Creditors*, 408.
11. Plaintiff cannot contradict by parol evidence, an act of mortgage on which he sues ; or prove anything beyond it. *Hill v. Hall*, 416.
12. Where notes secured by mortgage, delivered by the maker, have come again into his hands before maturity, the debt evidenced by them is extinguished by confusion. C. C. 2214. By re-issuing such notes, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage securing them, which being only an accessory to the debt between the maker and the payee, was extinguished with it. C. C. 3252, 3374. *Ib.*
13. The purchaser of dotal property legally alienated, has nothing to do with the investment of the proceeds ; the husband alone has the administration of the dowry. C. C. 2330. All that the purchaser has to do is to pay the price to the husband, who may act alone for the preservation or recovery of the dowry. The proceeds stand in lieu of the property itself, and become dotal. C. C. 2327. If the husband fail to reinvest the dotal funds, the wife will have a legal mortgage on his immovables, and a privilege on his movables, for their restitution. C. C. 2355, 3287.
Montfort v. Her Husband, 453.
14. Defendant executed a mortgage on a slave to secure the payment of a note given to plaintiff, the act stipulating that the mortgagor should, on paying a part, be entitled to renew the note for the balance, for a limited time, but there was no provision extending the mortgage to the new note. There was a part payment, and renewal for the balance ; plaintiff giving up to defendant the original note. Plaintiff afterwards presented the second note to the notary, and obtained from him a certificate that the original note had been presented to him, that plaintiff had declared that he had received the part payment and taken the second note in renewal, and that he, the notary, had *paraphed* it for the purpose of identifying it with the transaction. This certificate was not recorded at the Mortgage Office. Defendant sold the slave, under a certificate from the Recorder of Mortgages, that a mortgage existed on the slave to secure the payment of the first note. On an opposition by the purchaser to an order of seizure and sale taken out by plain-

tiff: *Held*, that the mortgage did not extend to the renewed note; that the purchaser was not bound to look beyond the certificate of the Recorder of Mortgages; that plaintiff, by surrendering the original note, without taking any steps to give notice to third persons of the mortgage claimed for his new note, gave the purchaser reason to believe that the original note and the mortgage were both extinguished; that nothing connects the second note with the mortgage; and that neither the note, nor the certificate of the notary, are such authentic evidence as authorize the issuing of an order of seizure and sale. *Levistone v. Bona*, 459.

15. A wife, who has mortgaged her paraphernal property to secure the payment of a loan, which was received by her husband, and did not enure to her benefit, though appearing alone in the contract, as having borrowed the amount with the authorization of her husband, may show by parol the real character of the transaction, and exonerate herself.

Firemens Insurance Company of New Orleans v. Cross, 508.

See NEW ORLEANS AND NASHVILLE RAIL ROAD COMPANY.

NEW ORLEANS AND NASHVILLE RAIL ROAD COMPANY.

The mortgage or privilege of the State, under the act of 13th March, 1837, to expedite the construction of the New Orleans and Nashville Rail Road, authorizing a loan to the Rail Road Company on the execution of a mortgage in favor of the State to secure its re-payment, does not extend to property acquired after the date of the mortgage.

State v. New Orleans and Nashville Rail Road Company, 231.

NEW ORLEANS, CITY OF.

1. Under the provisions of the act of 3d April, 1832, regulating the opening and improving of streets and public places in the city of New Orleans and its suburbs, the court before which proceedings have been instituted, can, in no case, amend an assessment made by the commissioners. The report must be approved or rejected *in toto*; and in the last case, the court is bound either to appoint new commissioners, or to refer the whole matter back to the same. And on appeal, the Supreme Court can only pronounce such judgment as should have been given below, either rejecting or approving the report; it has no power to pronounce upon the rights of the parties, from the evidence in the record. *Application of Mayor &c. of New Orleans for the widening of Roffignac Street*, 357.
2. The act of 3d April, 1832, authorizing a municipal corporation to take the property of a citizen for public use, to be paid for by others supposed to be benefited thereby, being in derogation of the rights of property, must be strictly pursued. *Ib.*
3. Under the act of 3d April, 1832, proceedings instituted for the opening or

improvement of any street or public place may be discontinued, on the payment of costs, at any time before the final confirmation by the court of the report of the assessors. No rights are acquired, or titles divested, until the assessment has been approved by the court. Nothing in that act repeals the general provision of the Civil Code, art. 489, which declares that private property cannot be taken for public uses, without *previous indemnity*.
Ib.

NEW TRIAL.

1. A new trial may be prayed for after three judicial days have elapsed since the judgment was pronounced, provided it has not been signed. C. P. 546, 548. *Smelser v. Williams*, 152.
2. Decision in *Chandler et al. v. Barker*, 13 La. 316, overruled. *Ib.*
3. Where in an action to recover possession of plans, books, &c., there is a verdict for the restoration of certain plans and books, and in default thereof, condemning the defendant to pay a fixed sum, a new trial must be allowed, that the verdict may determine what sum shall be paid on failure to deliver each particular plan or book.

Commercial Bank of New Orleans v. Stein, 189.

NONSUIT.

1. Where the evidence is so contradictory, that the court cannot determine to whom the property in dispute belongs, the plaintiff must be nonsuited.
Turner v. Lockwood, 444.
2. Plaintiff, to whom a slave had been mortgaged by defendant, having seized the slave in the hands of a third person, the order of seizure and sale was enjoined by the latter; and the opposition, being tried in the absence of the opponent's counsel, was dismissed, and the injunction dissolved. Another writ of seizure and sale having been issued, was again opposed by the same party. *Held*, that the dismissal on the first trial must be viewed as a nonsuit, and not as furnishing ground for the plea of *res judicata*, the opponent occupying the position of a plaintiff, and being bound to support his opposition by proof. *Levistone v. Bona*, 459.

NOTARY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4, 5, 6, 7, 8, 9, 22.

NOVATION.

1. Action on certain bills protested for non-payment. Defence that plaintiff had agreed to renew the bills for three months from maturity, and proof of that fact and of tender by defendants of notes for the renewal. *Held*, that

the obligation under the original bills was extinguished by novation, and that plaintiff could not recover, even with a stay of execution, till the expiration of the three months. *Benedict v. Stow*, 390.

2. The renewal of a note and mortgage between the same parties, though the interest which has accrued be added to the principal, is no novation—it is but a continuance of the same transaction. Novation is the substitution either of a new creditor, a new debtor, or a new debt. C. C. 2185. The pre-existent obligation must be extinguished ; if only modified, and any stipulation of the original obligation remains, there is no novation. *Ib.* 2183.

Rosenda v. Zabriskie, 493.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE.

PARTIES.

See PLEADING, II.

PARTNERSHIP.

1. One partner cannot sue another for any sum paid for the partnership, or any funds placed in it, until a final settlement, and then only for the balance which may be due. *Johnson v. Marshall*, 157.
2. A restriction on the power of a partner to use the name of the firm in the usual course of trade, will be without effect, as to third persons without notice. Not even fraud on the part of one partner will be any defence for his co-partners, where the obligation was contracted in the usual course of their trade, and the fraud was not participated in by the creditor.
Harrison v. Poole, 193.
3. The execution of a note raises a presumption that a just consideration has been given for it ; and the maker who pleads error or failure of consideration, must show it ; but where one partner is sought to be made liable on a note given by the other, and he alleges fraud and want of consideration, and shows circumstances somewhat suspicious, the burden of proving the consideration will be on the plaintiff. *Ib.*
4. The provision of the tenth section of the act of 28th March, 1840, abolishing imprisonment for debt, that the failure by a debtor “ to pay over money received, or collected for, or deposited with him for another,” shall be held presumptive evidence of fraud, cannot be applied to the case of a partner who has received and refuses to pay over money belonging to the partnership, and who is not liable for any specific sum, but only to account as a managing partner. It applies to those only who, having received money for another, without authority to dispose of it, fail to pay it over to the right owner. *Hanna v. Auter*, 221.
5. Action on a draft in favor of plaintiff, drawn by defendant on a person with

whom he was connected as a partner in planting. This partner being much in debt, had conveyed to the intervenor, by a deed of trust, executed in another state, his entire interest in the plantation and slaves, for the purpose of applying the crops to the payment of his debts. The intervenor was in possession under the deed, with the knowledge of defendant, though the latter was not a party to the instrument. Plaintiff having attached a part of the crop made by the intervenor on the plantation: *Held*, that the latter cannot be deprived by the creditors of either partner, of any part of the crop, until all the expenses of his management of the plantation have been reimbursed, and that the plaintiff could attach in the hands of the intervenor, only the balance due to defendant on a settlement of accounts.

Endicott v. Scott, 265.

6. Where the fact of a partnership is clearly shown, and that the bills of exchange sued on were drawn for the purpose of carrying on the business contemplated by the parties, plaintiffs will not be required to show, that they knew of the existence of the partnership when they took the bills.

Robertson v. De Lizardi, 300.

7. Where for a limited period, and in relation to a particular branch of commerce, defendants were to buy and sell on joint account, and to participate in the profits, they become, as to third persons, partners in relation to that trade. *Ib.*

8. There are cases in which the parties, though not partners *inter se*, will be held liable as such towards third persons. *Ib.*

9. Where the stockholder of a bank gives a note to the institution, even for the re-payment of a sum he was entitled to borrow, under its charter, the claim of the bank against him, is similar to that against any other borrower; and the obligation of the stockholder, results rather from his note, than from any relations as a partner in the bank. He cannot, consequently, where his domicile is in another parish, be cited before the tribunals of the place where the bank is established, under art. 165, No. 2, of the Code of Practice, relative to suits against partners.

Union Bank of Louisiana v. Lattimore, 342.

10. When a partnership has been once formed, no third person can be subsequently admitted into the firm, without the concurrence of all the original members. One attempted to be admitted otherwise, becomes only the partner of him who attempts to admit him. *Fearn v. Tiernan*, 367.

11. The publication in a newspaper by a third person, that he is a member of a commercial partnership, cannot be considered as an act emanating from any of the partners and giving credit to such person, unless knowledge of the publication be brought home to the partner sought to be charged. To render the latter responsible for the acts of such third person, it must be proved that credit was given to the partner, and that he tacitly acquiesced therein. Nor will the payment by the firm of acceptances by such third person made in their name, prove any thing against such partner, where it is shown that he was absent from the place of business of the firm until after its dissolution. *Ib.*

12. In an action between partners for the final settlement, and partition of the effects of the partnership, no power which may have been conferred during its progress on any one of the partners as a receiver, or for liquidating the affairs of the concern, can change their relative position and ultimate responsibilities towards each other. *Gridley v. Conner*, 445.
13. A partner cannot single out a particular transaction, and obtain a judgment against his co-partner thereupon. He can only require a final liquidation of the affairs of the partnership, and for this purpose any one of them may require, that all the matters in controversy shall be decided upon by a jury. *Ib.*
14. The act of 13th March, 1837, ch. 66, relative to limited or anonymous partnerships, does not apply to corporations, but to private associations of individuals. *Frazier v. Willcox*, 517.

PAYMENT.

1. A payment made in error may be recovered back, where such error, though the fault of the plaintiff, has not injured the party to whom the payment was made. *Massias v. Gasquet*, 137.
2. As a general rule no one will be presumed to have paid what he was not bound for; and where he reclaims an amount so paid, the burden of proving that he was neither legally nor morally bound therefor, will be on him. *Urquhart v. Gove*, 207.
3. A contract or payment made for the purpose of avoiding litigation, cannot be rescinded for error of law. C. C. 1840. *Ib.*

PLEADING.

- I. *Petition and Amendments thereto.*
- II. *Parties to Actions and who may Sue or be Sued.*
- III. *Exceptions and Answer.*
- IV. *Demand in Reconvention.*
- V. *Admissions.*

I. *Petition and Amendments thereto.*

1. It is not necessary in an action on a lost title, that the petition shall state such title. *Adams v. McCauley*, 184.
2. Where an attachment has been set aside on account of the insufficiency of the bond, the plaintiff may take out another attachment without filing a new petition, or having paid the costs of the first. Art. 492 of the Code of Practice does not apply to such a case. *Harrison v. Poole*, 193.
3. Where a wife has obtained against her husband, a judgment for the separation of property, and ascertaining the amount of her dotal and paraphernal rights, the creditors of the latter may still require her to prove her

claims contradictorily with them, whenever they have reason to suspect that the separation has been made with a view to defraud them; but they must put her on her guard by alleging fraud and collusion. Where no such allegation is made, she will not be bound to prove her claims *aliunde*, nor can the correctness of the judgment, or the sufficiency of the evidence upon which it was rendered, be inquired into. *Brassac v. Ducros*, 335.

4. Where, in an action to rescind a sale, on the ground that it was made with the view of giving a preference to certain creditors of the vendor, who is stated to be insolvent, the petition does not allege that the purchasers knew that their vendor was insolvent, and that the latter had not property sufficient to pay the debts of the petitioner, the sale cannot be avoided.

New Orleans Gas Light and Banking Company v. Currell, 438.

5. Action by plaintiffs for a balance due them as agents of defendant, for disbursements made for the use of a steamer, alleged to belong to the latter. Answer by defendant, denying the disbursements, and alleging that the boat was owned by plaintiffs and himself in partnership. A jury having found that a partnership existed, plaintiffs, in a supplemental petition, asked to change their original prayer into one for an account and settlement of all the affairs of the partnership, and for a judgment for the balance due them. *Held*, that the supplemental petition should have been rejected, as altering the nature of the original demand. C. P. 419. *Beard v. Call*, 466.

II. Parties to Actions and who may Sue or be Sued.

6. Article 43 of the Code of Practice which provides if the farmer or lessee of real estate be sued in any action, involving the title to real property, or any immovable right to such property, "that he shall declare to the plaintiff the name and residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and must defend it in the place of the tenant, who shall be discharged," applies only where the lessor or owner of the property sued for resides in the State, or, being absent, is represented therein; if the lessor reside out of the State, and is not represented therein, the lessee must defend the suit in his absence.

Plummer v. Schlatre, 29.

7. Plaintiff having made a surrender of his property under the insolvent laws of the State, subsequently applied to the District Court of the United States to be declared a bankrupt under the act of Congress of 1841. Previous to the latter application, his wife, who had obtained a judgment against him, had levied a *fi. fa.* on a claim belonging to the insolvent, alleged to have formed a part of the property given up to his creditors, at the time of his surrender under the insolvent laws of the State. The syndic appointed under the State laws, having taken a rule upon plaintiff to show cause why he should not deliver to him the certificate of the claim, and neither the assignee under the act of Congress, nor the wife of the insolvent having been made parties: *Held*, that the case must be remanded that the question which of the creditors are entitled to claim, may be decided contradictorily with the assignee, and the wife. *West v. His Creditors*, 88.

8. In joint actions all the debtors must be sued, and must remain in court till the end of the suit; and the judgment must be against each for his virile portion. *Van Wyck v. Hills*, 140.
9. One partner cannot sue another for any sum paid for the partnership, or any funds placed in it, until a final settlement, and then only for the balance which may be due. *Johnson v. Marshall*, 157.
10. Where by the death of a minor child, its mother becomes seised of all the rights of the former to the succession of the father, no preliminary steps are required to be taken by the mother, in the nature of an *additio hereditatis* to complete her right, in order to commence an action against the other heirs for a partition of the succession. *Penny v. Weston*, 165.
11. An action of debt against an heir may be premature, before he has signified his intention to accept the succession, and in an action of partition, under such circumstances, the defendant might disclaim; but the plaintiff is not bound, in the first instance, to institute any proceeding to compel him to assume the quality of heir. *Ib.*
12. Where the accounts of the tutor of a minor heir, presented to the Court of Probates for approval, are opposed by the latter, a co-heir may intervene in the proceedings, for the purpose of obtaining from their common tutor a legal settlement of their ancestor's estate. The cause of action is the same, and both claim in the same right. C. P. 389, 390.
Tutorship of Hacket, 290.
13. Parties interested in a debt or other property, may appoint agents to take care of their interest, and vest them with all necessary powers. C. C. 2954, *et seq.*; and an action may be maintained in the name of the agent, as well as in that of the principal, if power to that effect be given.
Frazier v. Willcox, 517.
14. The capacity of a foreign corporation to sue, is well established. *Ib.*

III. *Exceptions and Answer.*

15. Where an injunction has been obtained to stay proceedings under writs of *fi. fa.* issued at the suit of different parties, the latter will be entitled to sever in their defence, though the sheriff may have levied on the same property to satisfy all the writs. *Boone v. Porter*, 57.
16. Where respondents allege, "that they tendered to the plaintiff about, or at the maturity of the note, the sum" which they admit to be due, but without stating the manner in which the tender was made, or showing that the money was deposited as required by law, or denying the amicable demand and refusal to pay set forth in the petition, the plea will be considered informal and insufficient, and interest be allowed on the whole amount until finally paid. *Small v. Zacharie*, 144.
17. Where, in an action by a married woman, the petition alleges that she is authorized by her husband to sue, she will not be bound to prove the fact, unless specially denied; a general denial is not sufficient. Where her authority to sue, is specially denied, she must establish it by evidence, before

- she can compel the defendant to answer to the merits. C. P. 327, 333, 344. *Kent v. Monget*, 172.
18. Though it is well settled that dilatory and declinatory pleas must precede the *contestatio litis*, yet if the petition disclose a total want of legal right or authority to sue in the plaintiff, it may be acted on by the court below at any stage of the proceedings, though not pleaded; as where a married woman sues in her own name, without alleging that she is authorized by her husband. Such a defect could not be cured by any waiver on the part of the defendant. *Ib.*
19. Where a defendant has appeared by counsel and joined issue on the merits, objections to the steps taken to bring him into court will be disregarded. *Harrison v. Poole*, 193.
20. A general denial will place the *onus* of proving notice of protest on the plaintiff, who must establish that such notice was sent to the post office, nearest to defendant's residence, whether in the same or another State; and the latter may, under the general issue, show that the office to which it was sent was not the nearest. *Pollard v. Cook*, 199.
21. An exception that the petition and citation were not drawn or served in the French language, the maternal tongue of the defendant, must be pleaded *in limine litis*, or it will be considered as waived. It will be too late after a judgment by default has been confirmed, though the judgment of confirmation has not been signed. *Leeds v. Debuys*, 257.
22. The exception that a suit is premature, is a dilatory one, which must be pleaded *in limine litis*. It is too late after a judgment by default. *Benedict v. Williams*, 392.

IV. Demand in Reconvention.

23. Under the 7th section of the act of 20th March, 1839, amending article 375, of the Code of Practice, a demand in reconvention may be instituted for any cause, though not necessarily connected with or incidental to the main action, where the plaintiff resides out of the State, or in a different parish from the defendant. *Mayo v. Savory*, 1.

V. Admissions.

24. Where the answer admits that a portion of the amount claimed is due, judgment may be obtained therefor, on motion, without a trial; and the case be left open, as to the part in dispute. *Small v. Zacharie*, 144.
25. The rule that a party, wishing to avail himself of the admissions of his adversary, cannot divide them, but must take them entire, does not apply to admissions in the pleadings; but only to answers to interrogatories (C. P. art. 356,) or to judicial confessions made according to art. 2370 of the Civil Code. Thus, where the debt is acknowledged, but a tender of the amount alleged, the plaintiff will be exempted from the necessity of proving his claim; but as a matter of defence, the tender must be established by legal evidence, like any other fact tending to show a discharge from the obligation sued on. *Ib.*

POLICE JURY.

Where the inspector of roads and levees has failed to give to the absent proprietor the notice required by law of the work to be done on his levees, &c., without which the contractor to whom it has been adjudicated cannot proceed summarily to seize and sell the land, the latter may recover the amount at once of the Police Jury. Though the proprietor might be responsible in an ordinary action on a *quantum meruit*, the contractor is not bound to sue him. *Newcomb v. Police Jury of East Baton Rouge*, 233.

POPE.

See CATHOLIC CHURCH. CHURCH OF ST. FRANCIS OF POINTE COUPÉE, 2.

POSSESSION.

The legatee of a particular object will not be presumed to be cognizant of any defect of title in the testator, but be regarded as a possessor in good faith. *Sides v. Nettles*, 170.

See ACT SOUS SEIGN PRIVÉ.

POST OFFICES.

Post offices in the United States are established by law; and no evidence is required of what the law is. *Pollard v. Cook*, 199.

PRESCRIPTION.

1. The rule, *Quæ temporalia sunt ad agendum, sunt perpetua ad excipiendum*, applies only where a defendant is in the exercise of the right, or in possession of the property or position, attempted to be taken from him. It cannot protect a party who has remained silent, and suffered a purchaser to keep possession during the period required to prescribe an action of rescission. *Lea v. Myers*, 8.
2. Silence for seventeen years, after the age of majority, will be considered a tacit ratification of the acts of a minor. The longest period of prescription for such acts is ten years. C. C. 2218. *Ib.*
3. The prescription of one year, established by article 3499 of the Civil Code as to "retailers of provisions and liquors," is applicable only where supplies have been furnished for family use, and not to articles sold to shopkeepers. *Allen v. Terry*, 22.
4. The prescription of five years, established by sect. 4 of the act of 10th March, 1834, entitled, "an act relative to advertisements," as to "all in-

formalities connected with or growing out of any public sale by a parish judge, sheriff, auctioneer, or other public officer," applies only to such informalities as relate to the manner, time, and place of making the advertisements required by law for public sales, and not to all illegalities or nullities whatsoever. *Morton v. Reynolds*, 26.

5. Under the provisions of the Code of 1808, book 3, title 1, art 74, which declares that "until the acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect the deceased, who was the owner of the estate," prescription ran against a vacant succession, although minors were interested. *Leonard v. Fluker*, 148.
6. A change in the law by which prescription was allowed to run, under certain circumstances, against minors, will not deprive one interested in pleading it, of the benefit of the time elapsed before the repeal of the old law. The time so elapsed may be added to that since the majority of the party, to make out the necessary period of prescription. *Ib.*
7. The redhibitory action must be instituted within a year from the date of the sale; the only exceptions to this rule being, where the vendor knew of the vice and neglected to declare it to the purchaser; or, not being domiciliated in the State, absented himself before the expiration of the year following the sale, when the prescription remains suspended during his absence. C. C. 2512. *Ogden v. Michel*, 155.
8. A bequest by testament duly proved and ordered to be executed, is a title translatif of property, as much as a donation *inter vivos*. C. C. 3451.
Sides v. Nettles, 170.
9. To acquire by the prescription of ten years, it is not enough to show a title translatif of property, accompanied by possession for ten or twenty years. Good faith is essential, and must have existed at the commencement of the possession. Code of 1808, p. 488, art. 72. Such good faith does not consist in the belief only, that the person whose rights are acquired was the real owner of the property. This is indispensable to constitute good faith on the part of the purchaser; but, even where it exists, there may be bad faith in the latter, as where a deputy sheriff purchases property sold by himself under a *feri facias*. He knows the vices of his title; and does not, according to art. 495 of the Civil Code, possess as owner by virtue of an act sufficient in terms to transfer the property, of the defects of which he was ignorant. *McCluskey v. Webb*, 201.
10. Where a title is absolutely null, it cannot be the basis of prescription. *Aliter*, as to relative nullities. If those in whose favor they are established do not complain, prescription may be acquired under a title containing such relative nullities. *Ib.*
11. The prescription of five years, established by the act of 10th March, 1834, applies only to informalities in the manner of advertising and making public sales. *Ib.*
12. A minor who, after becoming of age, has accepted the accounts of his tutor, and given him a receipt in full and discharge from all claims, may, within four years after her majority, institute a direct action against him re-

specting the acts of the tutorship, or oppose his discharge when applied for by him ; and she will be relieved on proof that she acted in ignorance of her rights. C. C. 355, 356, 1815, 1841. *Tutorship of Hackett*, 290.

13. Plaintiff having paid A. the amount of a judgment, for which he had become liable, as surety of B. on an appeal bond, obtained in February, 1842, a judgment subrogating him to all the rights of A. ; who, in December, 1840, had recovered judgment against defendant, as surety of B., on a bail bond executed at the beginning of the original suit, sued to revoke a sale made by defendant in December, 1840, as fraudulent ; *Held*, that the prescription of one year, established by art. 1989 of the Civil Code, must bar any action against defendant, by A. ; that plaintiff, being subrogated to A.'s rights, can have no greater rights than he had ; that the judgment of subrogation, of February, 1842, is not one rendered against the defendant, within the meaning of art. 1989 ; and that the prescription did not commence to run from its date, but from that of the judgment of A. against the defendant, obtained in December, 1840. *Walker v. Vaudry*, 395.

PRESUMPTION.

See EVIDENCE, V.

PRIVILEGE.

1. The privilege of the lessor on the movables found in the house, yields to that for the funeral expenses of the debtor and family, where there is no other source from which they can be paid ; but it must be placed on the tableau of distribution immediately after such expenses.

Succession of Devine, 366.

2. Where a vendor allows the things on which he has a privilege, to be sold confusedly with a mass of other things belonging to his vendee, without making his claim, the privilege will be lost. C. C. 3175.

Bonnabel v. Rabeneau, 419.

3. If the husband fail to reinvest funds received from the sale of dotal property, the wife will have a legal mortgage on his immovables, and a privilege on his movables, for their restitution. C. C. 2355, 3287.

Montfort v. Her Husband, 453.

See ATTACHMENT, 6.

PROHIBITION.

1. The power to issue writs of prohibition was conferred on the Supreme Court merely as a means of enabling it to exercise its appellate jurisdiction. Like the writ of mandamus, a prohibition may be issued even where a party has other means of redress, if the slowness of ordinary legal proceedings be likely to produce such immediate injury as ought to be prevented.

State v. Judge of Commercial Court of New Orleans, 48.

2. The writ of mandamus is given to enable the Supreme Court to command inferior courts to act where delay would cause damage and injustice; and the writ of prohibition to restrain them, where their acting without authority would produce similar results. *Ib.*
3. The writ of prohibition is an extraordinary one, and should be issued only in cases of great necessity, clearly shown, and where the party has applied, in vain, to the inferior tribunals for relief. *Ib.*

PROVISIONAL SEIZURE.

On a rule to show cause, why a writ of provisional seizure should not be set aside, evidence will be inadmissible to establish facts, alleged as grounds for the rule, which belong to the merits of the case, or relate to the truth of the affidavit, which no law authorizes the defendants to disprove.

McCarty v. Lepaullard, (2d case,) 425.

PUBLIC LANDS OF THE UNITED STATES.

1. Decision in case of *Thompson v. Schlatre*, 13 La. 115, affirmed.
Combs v. Dodd, 58.
2. Where the proclamation of the President, offering a portion of the public lands of the United States for sale, is produced together with patents to a purchaser at such sale, the court will not look beyond them to ascertain whether the lands had been regularly surveyed. *Ib.*
3. Decision in the case of *Kiltridge v. Breaud*, 2 Robinson, 40, affirmed.
Kiltridge v. Breaud, 79.
4. It is not necessary to the validity of a purchase of public lands from the government of the United States, under the laws relating to back-lands, that the lands purchased should be described by the township, range, and section. *Ib.*
5. The title of a purchaser from the United States of a portion of the public domain, will not be affected by the omission of the Register of the Land Office to mark the sale on the township plat in his office, or by a subsequent sale of the same lands, through error, to another. *Ib.*
6. Where one entitled by law to a preference in the purchase of a particular piece of the public lands of the United States, in the exercise of his right, pays the price and receives from the proper officer a receipt for the same, with a certificate that he is entitled to purchase the land, the sale will be complete, though the evidence of it may not have been made out in the prescribed form. *Ib.*
7. The act of Congress of 5th May, 1830, authorizing the Registers of the Land Offices in Louisiana to receive entries of lands in certain cases, was passed for the relief of a class of persons who had paid to a Receiver the price of the lands they intended to purchase, but had not presented their receipts to the Register for his certificate, until too late to exercise their

- rights. It is inapplicable to cases where the application to purchase had been made to the Register, who admitted the applicant's right. *Ib.*
8. In a contest between parties claiming lands sold by the United States, the courts of this State, whose powers are not limited by any distinction between law and equity, will look to the facts of the case, and do justice between the parties, though a patent may have been issued to one of them. The principle is well settled in the jurisprudence of this State, and in that of the courts of the United States, that an equitable right, originating before the date of the patent, whether founded on an earlier entry or otherwise, may be inquired into. *Ib.*
 9. The acts of Congress conferring pre-emption rights on the settlers on the public lands, vest a legal title in the purchaser as soon as the purchase is made and the price paid: and the United States cannot take back the land nor sell it to another. *Ib.*
 10. A sale of a portion of the public lands of the United States, made in pursuance of an act of Congress, conferring authority for that purpose on the Register and Receiver of Public Moneys, will divest the government of its title. *Ib.*
 11. One who obtains a patent from the United States for a portion of the public lands, by suppressing a part of the facts of the case, will not be permitted to benefit himself thereby. The patent will enure to the benefit of the party entitled to recover the land. *Ib.*

QUASI CONTRACTS.

In the absence of any privity between plaintiff and defendant, a very strong case must be made out to justify the application of the maxim, that no man should be permitted to enrich himself at the expense of another, as a ground of recovery. Even among those who have dealt with each other, one may sometimes receive the benefit of the labor or expense of another without being bound to pay for it, as where a tenant has made improvements without authority from his lessor. *McWilliams v. Hagan*, 374.

QUASI OFFENCES.

Where one whose property has been seized under an execution against a third person, notifies the Marshal or Sheriff that the property seized belongs to him, he will not, by omitting to take legal measures to prevent the sale, lose his recourse against the officer. *Wright v. Cain*, 136.

RECEIVER.

The judges of the inferior courts cannot, of their own accord, appoint receivers for the purpose of collecting or keeping funds, or evidences of debt which may be the subject of litigation before them. Such appointments can be

made only with the consent of all the parties interested, and the assent of the judge can add nothing to the powers of the persons so appointed.

Frazier v. Willcox, 517.

See AGENCY, 7.

RECONVENTION.

See PLEADING, IV.

RECUSATION OF JUDGE.

1. Article 337 of the Code of Practice, which provides that the defendant may refuse to have his case tried by the judge before whom he has been sued, on account of the relationship existing between the judge and the plaintiff, was intended for the benefit and protection of the defendant; and where the latter waives his right of recusation, the party in whose favor a bias was supposed to exist, will not be permitted to exercise it.

Bonnefoy v. Landry, 23.

2. Cases in which the judge has recused himself, transferred in pursuance of the act of 27th February, 1841, ch. 32, from the Court of Probates, to be tried before the special judge provided by that act, sitting in the District Court, are to be tried in the same manner as if they had not been removed. The law, having made no provision for a trial by jury in the Court of Probates, none can be allowed in any such case by the special judge.

Penny v. Weston, 165.

REGISTRY.

See MORTGAGE, 1, 2, 6, 14.

RESCISSION, ACTION OF.

See SALE, IV.

RES JUDICATA.

1. A judgment rendered in an action commenced against a party in possession, who disclaims title, and cites his lessor to defend the suit, where the latter does not appear, will form *res judicata* only as to the possession; the question of title will be still open. *Morton v. Reynolds*, 26.
2. Where the damages awarded to the plaintiff, in an action instituted by him against an attorney of defendants, they being cited in warranty, for the amount stipulated to be paid to plaintiff in an agreement signed by defendants and plaintiff, and lent by the latter to the attorney, and not returned, were only for the temporary conversion of the agreement, which was pro-

duced on the trial, the signatures torn off, the judgment will be no bar to an action against defendants to enforce the agreement itself.

Story v. Luzenberg, 240.

3. Plaintiff, to whom a slave had been mortgaged by defendant, having seized the slave in the hands of a third person, the order of seizure and sale was enjoined by the latter; and the opposition, being tried in the absence of the opponent's counsel was dismissed, and the injunction dissolved. Another writ of seizure and sale having been issued, was again opposed by the same party. *Held*, that the dismissal on the first trial must be viewed as a non-suit, and not as furnishing ground for a plea of *res judicata*, the opponent occupying the position of a plaintiff, and being bound to support his opposition by proof. *Levistone v. Bona*, 459.

ROADS AND LEVEES.

Where the inspector of roads and levees has failed to give to the absent proprietor the notice required by law of the work to be done on his levees, &c., without which the contractor to whom it has been adjudicated cannot proceed summarily to seize and sell the land, the latter may recover the amount at once of the Police Jury. Though the proprietor might be responsible in an ordinary action on a *quantum meruit*, the contractor is not bound to sue him. *Newcomb v. Police Jury of East Baton Rouge*, 233.

RULE TO SHOW CAUSE.

1. Where the matters to be investigated are necessarily connected with and incidental to a main action, or a direct consequence of it, proceedings by a rule to show cause, in a summary way, are often convenient and legal; but such a mode of proceeding will not be permitted to supplant the regular rules of practice, or tolerated when intended to evade the plain provisions of law, by obtaining indirectly, what could not be obtained by a direct action. *White v. The Commissioners of the Merchants Bank of New Orleans*, 363.
2. The Merchants Bank of New Orleans, having surrendered its charter, under the act of 14th March, 1842, ch. 98, providing for the liquidation of banks, a judgment dissolving the corporation was rendered, commissioners appointed to close its affairs, and all judicial proceedings against it stayed. Plaintiffs having obtained a rule on defendants, to show cause why certain checks drawn by, or on the bank, should not be received by the commissioners in compensation of a debt of plaintiffs to the bank, and the evidence of such debt given up: *Held*, that the act having declared that, in all matters not otherwise provided for, the proceedings for the liquidation of the banks shall be the same as those prescribed in the acts relative to the voluntary surrender of property, and no especial provision having been made, the rule must be discharged. *Ib.*
3. On a rule to show cause why a writ of provisional seizure should not be set aside, evidence will be inadmissible to establish facts, alleged as

grounds for the rule, which belong to the merits of the case, or relate to the truth of the affidavit, which no law authorises the defendants to disprove.

McCarty v. Lepaullard, (2d case,) 425.

4. Proceedings under an order of seizure and sale, cannot be arrested by a rule to show cause. Art. 739, *et seq.*, of the Code of Practice, point out the mode in which opposition to executory process may be made by the defendant in it; and art. 395, *et seq.* of the same Code, and other laws, the means by which third persons may protect their rights.

Minot v. The Bank of the United States, 490.

SALE.

- I. *Contract of Sale—Its Form and Requisites.*
- II. *Obligations and Privilege of Vendor.*
- III. *Obligations of Vendee.*
- IV. *Rescission.*
- V. *Judicial, and other Public Sales.*

I. *Contract of Sale—Its Form and Requisites.*

1. Where the proprietor of two estates has alienated one of them, in any contest as to the property, the limits assigned by the vendor at the time of the sale, and not the ancient boundaries, must be consulted. C. C. 840.

Orillion v. Slack, 120.

2. An obligation, though null and void *ab initio*, may be ratified or confirmed expressly or tacitly, verbally, in writing, or by acts manifesting clearly such an intention, or even, in some cases, by silence. C. C. 2252.

Landry v. Connely, 127.

3. Parol evidence is inadmissible to prove a sale of real estate.

Smelser v. Williams, 152.

4. The seller is bound to explain himself clearly respecting the extent of his obligations; and any obscure or ambiguous clause will be construed against him. C. C. 2449. *Phillipi v. Gove*, 315.

5. The decision in *Doubrere v. Grillier's Syndic*, 2 Mart. N. S. 171, that an act *sous seign privé* will have effect against third persons from its date, if possession accompanied or followed its execution, was made under the Code of 1808, and is inconsistent with the provisions of art. 2417 of the present Civil Code. *Brassac v. Ducros*, 335.

6. Defendants, commission merchants, having contracted to sell a quantity of cotton belonging to their principals, to a third person for cash, before payment of the price or delivery, plaintiffs seized, in the hands of such third party, under a *fi. fa.* in a judgment against defendants, all the property, rights and credits of the latter. *Held*, that the vendors not being bound to deliver the cotton until the price was paid (C. C. 2463,) nothing was seized; and that the vendee might have disregarded it, and have paid the price to defendants and received the cotton. *Montgomery v. Brander*, 400.

7. Art. 2456 of the Civil Code, which declares that, "where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and, with respect to third persons, the parties must produce proof that they are acting in good faith, and establish the reality of the sale," recognizes the validity of the sales of movables against third persons, where the seller retains possession by a precarious title. To give effect to this article, and to the provisions of arts. 1917 and 2243 of the same Code, the cases put in art. 2456 must be considered as exceptions to the rule laid down in arts. 1917 and 2243.

Gontier v. Thomas, 435.

8. Immovables settled as dowry, cannot be alienated during the marriage, except in the cases provided for by arts. 2338, 2339, 2340, 2341, of the Civil Code. C. C. 2337. But when made in conformity to law, the sale is definitive and irrevocable, forever freeing them from any dotal rights of the wife. *Montfort v. Her Husband*, 453.

II. *Obligations and Privilege of Vendor.*

9. An exclusion of warranty, fraudulently made, cannot avail the vendor, who is bound to disclose redhibitory vices and defects, within his knowledge, not discoverable on inspection. C. C. 2480. *Aliter*, where such exclusion was made in good faith, there being no proof that the vendor knew of the existence of such vices. *Ogden v. Michel*, 155.

10. The exhibition of a sample on the sale of merchandize, is an indirect and tacit representation of the quality of the article; and unless the warranty is clearly and explicitly excepted by the vendor, he must deliver the article in a condition equal to that of the sample. *Phillipi v. Gove*, 315.

11. The vendor is bound to perfect the title of his vendee, before he can call upon the latter, for payment of the purchase money.

Toledano v. Desban, 330.

12. Where a vendor allows the things on which he has a privilege, to be sold confusedly with a mass of other things belonging to his vendee, without making his claim, the privilege will be lost. C. C. 3195.

Bonnabel v. Rabeneau, 419.

III. *Obligations of Vendee.*

13. The purchaser of dotal property legally alienated, has nothing to do with the investment of the proceeds; the husband alone has the administration of the dowry. C. C. 2330. All that the purchaser has to do is to pay the price to the husband, who may act alone for the preservation or recovery of the dowry. The proceeds stand in lieu of the property itself, and become dotal. C. C. 2327. If the husband fail to reinvest the dotal funds, the wife will have a legal mortgage on his immovables, and a privilege on his movables, for their restitution. C. C. 2355, 3287.

Montfort v. Her Husband, 453.

IV. *Rescission.*

14. The rule, *Quæ temporalia sunt ad agendum, sunt perpetua ad excipiendum*, applies only where a defendant is in the exercise of the right, or in possession of the property or position, attempted to be taken from him. It cannot protect a party who has remained silent, and suffered a purchaser to keep possession during the period required to prescribe an action of rescission.

Lea v. Myers, 8.

15. The redhibitory action must be instituted within a year from the date of the sale; the only exceptions to this rule being, where the vendor knew of the vice and neglected to declare it to the purchaser; or, not being domiciliated in the State, absented himself before the expiration of the year following the sale, when the prescription remains suspended during his absence. C. C. 2512. *Ogden v. Michel*, 155.

16. A. had two children by his wife, who, after his death, married B., by whom she also had children, and B. became the tutor of the children of the first marriage. B. having died, C. was appointed tutor to the issue of both marriages, and after the majority of the children by the first husband, presented his accounts to the Court of Probates, both as their tutor, and as tutor of the minor heirs of their first tutor. On an opposition to the approval of the account made by the heirs of the first marriage, claiming the proceeds of a tract of land, included in an inventory made after the death of the wife, of the community which existed between her and her second husband, which had been adjudicated to the latter as property common between him and his children, and which, after his death, was sold as belonging to his succession, it was proved that the land belonged to the father of the opponents before his marriage. The land was claimed by the heirs of B., under an act of sale executed by A. to D., from whom they derived title. D. being sworn as a witness testified, that the land had been conveyed to him by A., but that he had never paid any part of the price, nor taken possession of the land, there being an understanding between A. and himself, that he should re-convey the land when required; that after A's death, in consideration of receiving back a note he had given for the price from B., he conveyed the land to B. and his wife, believing that thereby the legal title thereto would be vested in the heirs of A. The tutors excepted to the admissibility of this evidence, on the ground that A. having been a party to the sale to D. the opponents, his heirs, cannot, any more than he could, prove its simulation, without producing a counter-letter. *Per Curiam*. If such a letter had been taken by A., as the evidence renders probable, it must have fallen into the hands of B. their tutor, and the very person who they allege attempted to defraud them. Under such circumstances they should, perhaps, be permitted to prove the simulation by parol.

Tutorship of Hackett, 290.

17. As a general rule, written titles are conclusive between the parties, and they are estopped from contradicting them; but third persons, not parties to an act, may prove its simulation by parol, or that an act purporting to be

a sale, was in truth a *dation en paiement* for the benefit of such third persons, and this especially where fraud is alleged. *Ib.*

18. Where several things sold together, *e. g.* so many coils of bale rope, are independent of each other, not forming a whole, and their value is not increased by their union, a redhibitory action will lie only for the things found defective, and the contract must be carried into effect as to the rest. Such is the clear inference from art. 2518 of the Civil Code.

Ledoux v. Armor, 381.

19. In the absence of any expression of legislative will, proof of its being the commercial custom of a particular place as to certain articles, to take back the whole lot sold, and to restore the price on the discovery of any portion being defective, would be entitled to some weight, if shown to have existed long enough to have become generally known, and to warrant the presumption that contracts were made in relation to it; but where the law has provided a rule, no customs of any set of men can have a force paramount to the law. *Ib.*

20. Pending an action for the rescission of a sale, vendees sold the article which was the subject of the contract, without the consent of defendant, or any order of court. *Held*, that the return of the thing sold is indispensable to a recovery in any redhibitory action, and that by such sale the plaintiffs disabled themselves from recovery. *Ib.*

21. Where the purchaser at a Sheriff's sale, shows a judgment, execution, and sale, the presumption *omnia recte acta*, will arise in his favor. It is for the opponent, who seeks to annul the sale, to destroy this presumption, by proof of such irregularities as must vitiate the proceedings.

New Orleans Gas Light and Banking Company v. Allen, 387.

22. Where, in an action to rescind a sale, on the ground that it was made with the view of giving a preference to certain creditors of the vendor, who is stated to be insolvent, the petition does not allege that the purchasers knew that their vendor was insolvent, and that the latter had not property sufficient to pay the debt of the petitioner; the sale cannot be avoided.

New Orleans Gas Light and Banking Company v. Currell, 438.

23. Art. 1982 of the Civil Code is applicable exclusively to a particular class of cases, in which the only alleged ground of nullity is an undue preference given to one of the creditors of an insolvent; while art. 1989 applies to all other contracts by which creditors are injured. *Ib.*

V. Judicial and other Public Sales.

24. The prescription of five years, established by sect. 4 of the act of 10th March, 1834, entitled "an act relative to advertisements," as to "all informalities connected with or growing out of any public sale by a parish judge, sheriff, auctioneer, or other public officer," applies only to such informalities as relate to the manner, time, and place of making the advertisements required by law for public sales, and not to all illegalities or nullities whatever. *Morton v. Reynolds*, 26.

25. Where a Sheriff executes a deed to the purchaser of property sold at a

judicial sale, stating therein that he had received the price, he will be responsible for any balance coming to the debtor, though he may not have received any part thereof; but if the debtor, with a full knowledge of the facts, enters into an agreement with the purchaser, by which the property is re-conveyed to him on conditions stipulated between themselves, it will be too late for him to complain. *Winter v. Zacharie*, 35.

26. The purchaser at a sheriff's sale cannot refuse to pay the price he has bid, on the ground that there existed mortgages on the property of an older date than that under which he purchased, or that the legal formalities have not been complied with, unless he has been disturbed in his possession, or has just reason to apprehend that he will be. *C. P.* 710.

Collins v. Daly, 112.

27. Where the purchaser of property of a succession, sold by order of a Court of Probates, fails to comply with the terms of the sale, that court has authority to compel a compliance, or to order the property to be sold anew *à la folle enchère*. *Landry v. Connely*, 127.

28. The execution of an act under private signature, by the purchaser of property at a succession sale, resold by order of the Probate Court on his failure to comply with the terms of sale, by which he consents to lease or buy the property from the second purchaser, is an acquiescence in the judgment divesting his title. *Ib.*

29. Where the property of minor heirs has been illegally sold, though not bound by the proceedings, they may on coming of age ratify the sale, and claim the proceeds. *Tutorship of Hackett*, 290.

SEQUESTRATION.

1. The remedy given to a defendant, by proceedings on the sequestration bond, is not exclusive of others. *Clark v. Christine*, 196.
2. A sequestration can be issued only in cases in which it is expressly allowed by law. *Talamon v. Ylasse*, 462.
3. Plaintiffs in an action to annul a sale of land made by their debtor to a third person as in fraud of their rights, having no lien or privilege upon the property, cannot cause it to be sequestered, pending the action, on the ground that they are apprehensive that the purchaser will sell or incur it for the purpose of defrauding them and the other creditors of the vender; nor could they, were the land still in the possession of their debtor. *C. P.* 275. Acts of 7th April, 1826, § 9, and 20th March, 1839, § 6. *Ib.*
4. In ordinary cases of attachment, or where a judicial sequestrator is necessary, the law has provided an officer, to wit, the sheriff, to take care of the property seized; but he is to act only in the event of the parties failing to appoint a fit and proper sequestrator, or keeper of their own selection.

Frazier v. Willcox, 517.

5. Art. 2941, *et seq.* of the Civil Code, which authorize the appointment, and prescribe the duties of conventional sequestrators, do not prevent parties from conferring other powers on such officers. *Ib.*

SHERIFF.

1. Where a sheriff executes a deed to the purchaser of property sold at a judicial sale, stating therein that he had received the price, he will be responsible for any balance coming to the debtor, though he may not have received any part thereof; but if the debtor, with a full knowledge of the facts, enters into an agreement with the purchaser, by which the property is reconveyed to him on conditions stipulated between themselves, it will be too late for him to complain. *Winter v. Zacharie*, 35.
2. A sheriff must, at his peril, avoid seizing under execution, property not belonging to the defendant. It is not enough that he should presume, even on strong grounds, that it belongs to the latter; he must know it.
Duperron v. Van Wickle, 39.
3. One whose property is illegally seized under an execution against another person, is not bound, on being informed thereof, to give any notice to the sheriff. He may, at once, seek relief by suit; unless, to avoid costs, he choose to make an amicable demand. And where the property has been sold by the sheriff, he will be entitled to recover, not the price at which it was sold, but its real value at the time. *Ib.*
4. In an action by a third person, against the sheriff and the plaintiffs in execution, for the value of property belonging to such third person, illegally seized and sold, and the proceeds of which had been applied in satisfaction of the execution, it will be no defence on the part of such plaintiffs that they did not authorize the seizure. They are bound to indemnify those who have been injured by the party employed to make the amount of their execution. *Qui sentit commodum, debet sentire et onus. Ib.*
5. Where one whose property has been seized under an execution against a third person notifies the marshal or sheriff that the property seized belongs to him, he will not, by omitting to take legal measures to prevent the sale, lose his recourse against the officer. *Wright v. Cain*, 136.
6. A purchase by a deputy sheriff of property sold by himself under a *feri facias*, is absolutely null. *McCluskey v. Webb*, 201.

See SEQUESTRATION, 4.

SHIPPING.

The master of a vessel cannot hypothecate her for a preexisting debt, and the necessity for the loan must be shown to have existed at the time it was made. The bond is not evidence of this necessity, nor of the absence of other means of obtaining the money. This must be shown *aliunde*, and otherwise than by the statement of the master, who cannot acquire authority from his own assertions. *Clark v. Laidlaw*, 345.

SIMULATION.

See FRAUD.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of the United States.*II. *Statutes of the State.*III. *Statute of Pennsylvania.*I. *Statutes of the United States.*

- 1789, September 24. Judiciary act. *West v. His Creditors*, 88.
 1793, March 2. Amending judiciary act of 1789. *Ib.*
 1830, May 5. Authorizing Registers of the Land Office in Louisiana to receive entries of lands in certain cases. *Kittridge v. Breaud*, 79.
 1841, August 19. Establishing uniform system of bankruptcy. *West v. His Creditors*, 88.

II. *Statutes of the State.*

- 1810, March 24. Recording of mortgages and other notarial acts. *Succession of Falconer*, 5.
 1813, March 26. *Ib.*
 1814, March 14. Incorporation of Catholic Church of St. Francis of Pointe Coupée. *Church of St. Francis of Pointe Coupée v. Martin*, 62.
 1815, January 30. State Taxes. *Voisin v. Guillet*, 267.
 —, March 25, § 12. Duty of clerks of court as to fines to be collected by Sheriff. *Inhabitants of New Orleans v. Hozey*, 378.
 1817, February 20. Voluntary surrender of property. *Cougot v. Fournier*, 420.
 1818, March 13. Election of domicile as to promissory notes in favor of banks. *Union Bank of Louisiana v. Lattimore*, 342.
 —, — 18. Creating offices of Surveyor General and Parish Surveyors, *Buisson v. Grant*, 360.
 1823, March 27. Incompetency of maker of bill or note, as a witness. *Johnson v. Marshall*, 157.
 1824, April 12, § 16. Repealing articles of Civil Code inconsistent with Code of Practice. *Vance v. Lafferanderie*, 340.
 1825, February 19. Amending art. 341 of Civil Code as to tutors. *Tutorship of Hackett*, 291.
 1826, April 7, § 9. Amending Code of Practice—sequestrations. *Talamon v. Ytasse*, 462.
 —, —, § 11. ——— Commissions to take testimony. *Slidell v. Rightor*, 59.
 1827, January 31. Emancipation of slaves. *Nimmo v. Bonney*, 176.
 —, March 13. Protests of bills and notes. *Johnson v. Marshall*, 157.
 —, —, 20, § 5. Conveyances of immoveables and slaves in Parish of Orleans. *Brassac v. Ducros*, 335.
 1828, March 25, § 13. Actions against heirs after partition of successions. *Picou v. Dussuau*, 412.

- 1828, March 25, § 25. Abolishing rules of proceedings in force before promulgation of Code of Practice. *Union Bank of Louisiana v. Lattimore*, 342.
- 1829, February 7. Roads and levies—rights of undertaker of improvements to seize and sell land. *Newcomb v. Police Jury of East Baton Rouge*, 233.
- 1832, April 3. Opening and improvement of Streets, &c. in New Orleans. *Application of Mayor &c. of New Orleans for widening of Rossignac Street*, 357.
- 1833, February 26, § 1. Charter of First Congregational Church of New Orleans. *First Congregational Church of New Orleans v. Henderson*, 209.
- 1834, March 10, § 4. Relative to advertisements—prescription against informalities in sales by public officers. *Morton v. Reynolds*, 26. *McCluskey v. Webb*, 201.
- 1835, April 1, § 20, 27. Charter of Exchange and Banking Company of New Orleans. *Commissioners of the Exchange and Banking Company of New Orleans v. Bein*, 225.
- 1836, February 25. Charter of Merchants Bank of New Orleans. *Frazier v. Willcox*, 517.
- 1837, March 13. Voluntary surrender of property and settlement of successions. *Montilly v. His Creditors*, 142. *Nimmo v. Bonney*, 176.
- , March 13. Expediting construction of New Orleans and Nashville Rail Road. *State v. New Orleans and Nashville Rail Road Company*, 231.
- , March 13. Limited or anonymous partnerships. *Frazier v. Willcox*, 517.
- 1838, March 12. Amending act of 13th March, 1837, relative to the New Orleans and Nashville Rail Road Company. *State v. New Orleans and Nashville Rail Road Company*, 231.
- , March 12. Collector of State taxes on lands, &c. in Parish of Orleans. *Voisin v. Guillet*, 267.
- 1839, March 20, § 6. Amending Code of Practice—sequestrations. *Talmon v. Ytasse*, 462.
- , § 7. ——— demands in reconvention. *Mayo v. Savory*, 1. *Clark v. Christine*, 196.
- , § 17. ——— commissions to take testimony. *Clark v. Savory*, 1.
- , § 19. ——— error and irregularities in appeals. *Duperron v. Van Wickle*, 39.
- 1840, February 28. Collector of State taxes on lands, &c. in Parish of Orleans. *Voisin v. Guillet*, 267.
- , March 28, § 10. Abolishing imprisonment for debt—presumption of fraud. *Hanna v. Auter*, 221.
- Supplementary to act of same date abolishing imprisonment for debt. *Phillips v. Hawkins*, 218.

- 1841, February 27. Recusation of judges in third, ninth, and tenth judicial districts. *Penny v. Weston*, 165.
- , March 6. Amending charter of First Congregational Church of New Orleans. *First Congregational Church of New Orleans v. Henderson*, 209.
- 1842, February 5. Reviving charters of banks in New Orleans. *Union Bank of Louisiana v. Erwin*, 458. *State v. Union Bank of New Orleans*, 499.
- , February 24. To prevent further violations of law by the banks. *State v. Union Bank of Louisiana*, 499.
- , March 14. Liquidation of banks. *White v. Commissioners of the Merchants Bank of New Orleans*, 383.
- , March 23. Exempting certain rights from seizure under a *fi. fa.* *Vance v. Lafferanderie*, 340.

III. Statute of Pennsylvania.

Charter of the Bank of the United States of Pennsylvania. *Frazier v. Willcox*, 517.

SUBROGATION.

See SURETY, 4, 5.

SUBSTITUTION.

See DONATIONS MORTIS CAUSA, 7, 8, 11, 12.

SUCCESSIONS.

- I. *Jurisdiction in matters of Succession.*
- II. *Of Executors, Administrators, and Curators.*
- III. *Inventory of Effects.*
- IV. *Heirs and Legatees.*
- V. *Claims against Successions.*
- VI. *Prescription as affecting Successions.*
- VII. *Sale of Property.*

I. Jurisdiction in Matters of Succession.

1. The ordinary tribunals have jurisdiction of suits against heirs, whether minors or of age, in all cases where an estate, after having been administered by a curator, testamentary executor, or tutor of a beneficiary heir, has come into their possession, or has been absolutely accepted; while the courts of probate have exclusive cognizance of all claims for money against successions under the management of curators, testamentary executors, or administrators. C. P. 924, 995, 996. *Babin v. Dodd*, 20.



2. Claims against minors, interdicted or absent persons, whose estates are administered by curators, may be recovered before the ordinary tribunals. It is no objection to the exercise of such jurisdiction, that courts of probate have alone the means and right of fixing the amount which a tutor may allow for the expenditures of his ward. Proof of the means and revenue of the latter may be adduced before either tribunal; nor would any judgment of an ordinary court, allowing the claim, interfere with the powers of the court of probate, when auditing the tutor's accounts, to reject such portion of the sum paid under the judgment as might be found to exceed the revenue of the ward; as the tutor would be liable for any illegal acts or contracts made by him, on which such judgment was rendered. *Ib.*
3. The Court of Probates having jurisdiction of actions for the partition of successions, must necessarily inquire what property composes the estate to be partitioned, and have power to decide upon questions of title incidental to the main question of partition, though without jurisdiction, under other circumstances, to decide such a question. *Penny v. Weston*, 165.
4. Courts of ordinary jurisdiction have exclusive cognizance of actions to annul a partition of slaves, made among the heirs of a succession.
Clark v. Christine, 196.
5. Courts of Probate have concurrent jurisdiction, with the District Courts, of an action by the heir for the settlement and partition of the community which existed between a husband and wife, after its dissolution by the death of the latter; and the circumstance of the defendant's denying the heirship of the plaintiff, and alleging himself to be the heir, can in no manner change the nature or object of the action, so as to deprive the Court of Probates of its jurisdiction. Nor can its jurisdiction be affected by the fact that the plaintiff's right to inherit must be determined, before proceeding to examine the issues relative to the settlement and liquidation of the community; the competency of the court being determined by the nature of the legal rights which the plaintiff seeks to enforce, and not by the question of his right to recover. *Babin v. Nolan*, 278.
6. Art. 996 of the Code of Practice which provides, that when an estate "is in the possession of heirs, either present, or represented in the State, though all or some of them be minors, actions for debts due from such successions shall be brought before the ordinary tribunals, either against the heirs themselves, if they be of age, or against their curators if they be under age or interdicted," applies to estates accepted absolutely, or to those which, after having been administered by a curator, testamentary executor, &c., have come into the possession of the heirs. If the heirs be all of age, and accept unconditionally, they are immediately put in possession of all the property, and are suable before the ordinary tribunals for their virile portion of the debts, as if contracted by themselves. If some are minors, the succession cannot be accepted by, nor for them, but with the benefit of inventory. When thus accepted, it cannot be administered partially, but the whole estate must be placed under the management of an administrator, and no part comes legally into the possession of the heirs as such, until the ad-

ministration is terminated, or a partition is legally made among the heirs. Until such administration or partition, the estate must be administered under the authority of the Court of Probates, in which it was opened, and all claims for money against it must, under arts. 924, § 13, and 983 of the Code of Practice, be presented there for settlement. C. C. 1002 1040, 1051. C. P. 992. Act 25th March, 1828, ch. 83, § 13.

Picou v. Dussau, 412.

See COURTS, 10.

II. Of Executors, Administrators, and Curators.

7. The executors appointed by the testator, or, in case of their failure to act, a dative testamentary executor, are the only persons competent to carry the provisions of a will into effect.

State v. Judge of Probates of New Orleans, 42.

8. Action by the heirs against the executors to recover the possession of certain slaves until they can be legally emancipated, in compliance with the will of the testator and the value of their services from the death of the ancestor: *Held*, that, the petitioners having proved their heirship only on the trial of the cause, the executors, who are rightfully in possession of the slaves and bound to keep them, are not accountable for the value of their services. *Nimmo v. Bonney*, 176.

9. A testamentary executor, to whom the deceased bequeathed a certain sum as a recompense for services rendered by him, and as an evidence of the friendship of the testator, and who has accepted the bequest, cannot claim any commission for his services, unless the testator formally expressed his intention that such legacy should be over and above the commissions. C. C. 1679. Nor where, after the expiration of his term as executor, he has continued to act as administrator in the settlement of the estate, can he charge any commission in the latter capacity. His legacy stands in lieu of all commissions, in the administration of the estate.

Succession of Cucullu, 397.

10. Where one who has acted as curator of a succession, and failed to pay over funds which came into his hands as such, makes a voluntary surrender of his property to his creditors, under the act of 20th February, 1817, the surety on his bond as curator may oppose his surrender. C. C. 3026. The failure or neglect of a creditor to oppose the surrender, cannot operate a release of the surety. *Per Curiam*: The effect of the surrender was only to discharge the debtor from imprisonment; it did not release him from the payment of his debts. *Cougot v. Fournier*, 420.

III. Inventory of Effects.

11. The principal object of the law requiring a public inventory to be made of all the effects, moveable and immoveable, of a succession or community, is to establish the existence of all the property, and to show the whole amount, or value thereof. C. C. 1098, 1099, 1100, 1101. Such an inventory is to serve us as the basis of the settlement of the estate, so far as it shows the

effects belonging to it, but is not conclusive proof of the real value of the property, nor the exclusive criterion by which those who are interested, are to be charged in the partition and settlement of the estate. Save where the law has declared in positive terms that the property inventoried shall be taken at the estimated value, such estimation is not conclusive.

Babin v. Nolan, 278.

IV. *Heirs and Legatees.*

12. One who claims to be put in possession of an estate as universal legatee, must proceed contradictorily with the testamentary executors, or dative testamentary executor; if there be neither, he must cause a dative testamentary executor to be appointed. C. C. 1000, 1001, 1002, 1003. And so of successions administered by curators. C. C. 1181.

State v. Judge of Probates of New Orleans, 42.

13. Minor heirs, who have not accepted, must be considered (saving their right to accept at a future time,) as strangers to the succession.

Leonard v. Fluker, 148.

14. Where by the death of a minor child, its mother becomes seized of all the rights of the former to the succession of the father, no preliminary steps are required to be taken by the mother, in the nature of an *additio hereditatis* to complete her right, in order to commence an action against the other heirs for a partition of the succession. *Penny v. Weston*, 165.

15. An action of debt against an heir may be premature, before he has signified his intention to accept the succession, and in an action of partition, under such circumstances, the defendant might disclaim; but the plaintiff is not bound, in the first instance, to institute any proceeding to compel him to assume the quality of heir. *Ib.*

16. Where in an action for the partition of a succession, in which a settlement of all claims among the heirs ought properly to be gone into, an act signed by the tutrix of the minor heirs, waiving her mortgage as tutrix on a tract of land, had been given in evidence, a promissory note executed as evidence of the debt secured by the mortgage, may be received to rebut the presumption of payment resulting from the release of the mortgage. *Ib.*

17. One who has accepted a remunerative legacy, will be bound by the acceptance. If he considered himself entitled to claim a larger sum for his services, he should have renounced the legacy, and have claimed as a creditor.

Succession of Cucullu, 397.

See DONATIONS MORTIS CAUSA, 5.

V. *Claims against Successions.*

18. The privilege of the lessor on the moveables found in the house, yields to that for the funeral expenses of the debtor and family, where there is no other source from which they can be paid; but it must be placed on the table of distribution immediately after such expenses.

Succession of Devine, 366.

19. A claim for a sum of money against a succession, should not be engrafted

on a proceeding, the object of which is to call upon the heirs to declare whether they accept or refuse the estate. Where, under such a proceeding, the heirs of full age fail to answer whether they accept or renounce, they may be declared unconditional heirs, and liable to be sued as such. C. C. 1029. But as to minors, no judgment of any kind can be rendered against them. They can, under no circumstances, be considered as having accepted absolutely; (C. C. 346;) but must be regarded as heirs of age, accepting with the benefit of inventory. The succession should have been put under administration, as provided by art. 1040 of the Civil Code.

Picou v. Dussau, 419.

See DONATIONS MORTIS CAUSA, 10.

VI. Prescription as affecting Successions.

20. Under the provision of the Code of 1808, book 3, title 1, art. 74, which declares that "until the acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect the deceased, who was the owner of the estate," prescription ran against a vacant succession, although minors were interested. *Leonard v. Fluker*, 148.

VII. Sale of Property.

21. Article 1265 of the Civil Code, which provides that "any co-heir of age, at the sale of the hereditary effects, can become a purchaser to the amount of the portion owing to him from the succession, and is not obliged to pay the surplus of the purchase money over the portion coming to him, until this portion has been definitively fixed by a partition," does not apply to the case of a husband who resists the payment of a note executed by him, in the hands of the administrator of the succession of the payee, on the ground that his wife is an heir of the deceased. *Landry v. Le Blanc*, 37.
22. Where the purchaser of property of a succession, sold by order of a Court of Probates, fails to comply with the terms of the sale, that court has authority to compel a compliance, or to order the property to be sold anew *à la folle enchère*. *Landry v. Connely*, 127.
23. The execution of an act under private signature, by the purchaser of property at a succession sale, resold by order of the Probate Court on his failure to comply with the terms of sale, by which he consents to lease or buy the property from the second purchaser, is an acquiescence in the judgment divesting his title. *Ib.*

SUMMARY PROCEEDINGS.

Injunctions, arresting summary proceedings, apparently authorized by the parties, are required by the Code of Practice, (arts. 740, 741, 751, 756,) to be tried summarily; but the parties cannot be deprived of any of the means of procuring evidence, within a reasonable delay. *Slidell v. Rightor*, 59.

SURETY.

1. In a question as to the sufficiency of the surety on an attachment bond, his actual means, and not the amount for which, from the nature of the case, he may be ultimately liable, must be looked to. C. C. 3011, 3012, 3033.

Lard v. Strother, 95.

2. In an action by the payee, against the endorsers of a note who put their names on it merely to secure its payment, the latter must be viewed as sureties, and as such will be entitled to avail themselves of all the pleas not personal to the principal, of which he could take advantage. C. C. 2208. *Johnson v. Marshall*, 157.

3. Where one not a party to a bill or note, puts his name upon it, he will be presumed to have done so as surety. *Gilbert v. Cooper*, 161.

4. Plaintiff having paid A. the amount of a judgment, for which he had become liable, as surety of B. on an appeal bond, obtained in February, 1842, a judgment subrogating him to all the rights of A., who, in December, 1840, had recovered judgment against defendant, as surety of B., on a bail bond executed at the beginning of the original suit, sued to revoke a sale made by defendant in December, 1840, as fraudulent; *Held*, that the prescription of one year, established by art. 1989 of the Civil Code, must bar any action against defendant, by A.; that plaintiff, being subrogated to A.'s rights, can have no greater rights than he had; that the judgment of subrogation of February, 1842, is not one rendered against the defendant within the meaning of art. 1989; and that the prescription did not commence to run from its date, but from that of the judgment of A. against the defendant, obtained in December, 1840. *Walker v. Vaudry*, 395.

5. Where the holders of a note, the payment of which the makers guaranteed by the pledge of another note secured by mortgage, do any act by which the mortgage is destroyed, the endorsers of the first note will be released, they having a right to be subrogated to the mortgage. C. C. 3030.

Commissioners of the Merchants Bank of New Orleans v. Cordeviollé, 506.

See BAIL. CONTRACTS, 3. SUCCESSIONS, 10.

SURVEY.

The act of 18th March, 1818, creating the offices of Surveyor General and Parish Surveyor, contains nothing indicating an intention to prevent any municipal corporation within a parish, from appointing their own surveyors, or making it the duty of owners of property to employ the surveyors appointed by the State, and no other; and arts. 828, 829 of the Civil Code mainly relate to cases of dispute between adjoining proprietors as to the boundaries between their lands. Although the formalities prescribed by these articles are required to be fulfilled by a sworn officer of the State, for the purpose of fixing permanently the limits of property, it does not follow

that a surveyor appointed by a municipal corporation, or any other not commissioned by the State, cannot be employed by a proprietor desirous of having his land surveyed and its limits ascertained; but such survey and fixing of limits, will not have the same binding effect upon his neighbor, as if made by the Parish Surveyor, nor will the *procès verbal* prove itself, or obtain full faith in the courts of this State. *Buisson v. Grant*, 360.

TAXES, COLLECTOR OF STATE.

The act of 12th March, 1838, creating the office of Collector of State taxes on landed property, slaves, and vehicles for the parish of Orleans, contemplates and provides that a collector of State taxes for that parish shall be appointed every year, for the special purpose of collecting the taxes due on the assessment roll, made for and during the year of his appointment, without any reference to the collection of the balance of the taxes remaining due for the preceding year. The bond required relates exclusively to the assessment made during the year of the appointment. And under the act of 28th February, 1840, amending that of 12th March, 1838, though another person may have been appointed collector for the next year, the collector of the preceding year is authorized, and bound to retain the assessment roll and receipts for taxes uncollected at the end of his year, and to proceed with the collection of such taxes until, according to the terms of his contract with the State, he shall have collected and accounted for all the State taxes for the year for which he was appointed. The appointment of a new collector does not destroy the commission of his predecessor.

Voisin v. Guillet, 267.

THIRD PERSONS.

A wife who has renounced the community of *acquêts*, must be regarded as a third person in relation to sales of community property made during the marriage; and every thing done during the marriage in relation to the sale or alienation of property, must be viewed as done by the husband alone.

Brassac v. Ducros, 335.

TREATY OF PARIS.

The third article of the treaty of Paris, of the 30th April, 1803, between the United States and the French Republic, by which the territory of Louisiana was ceded to the former, ceased to have any effect after the admission of Louisiana into the Union, on the 30th April, 1812.

Church of St. Francis of Pointe Coupée v. Martin, 62.

TRIAL.

Where an inferior judge refuses to try a cause at issue between the parties,

on the ground that others unknown, may be interested, and should be made parties, a mandamus will be granted to compel him to proceed. If those who are interested and informed of the proceedings, do not appear to protect their rights, they must bear the consequences; and those who are neither parties nor privies to the proceedings cannot be affected by the judgment.

State v. Judge of the Commercial Court, 227.

USURY.

1. A promise to pay usurious interest is not such a natural obligation as will form a good consideration for a legal contract. A natural obligation is one which cannot be enforced by action, but which is binding in conscience and according to natural justice. C. C. 1750, § 2. To perform a promise is a matter of conscience; and if a contract, not illicit or immoral, but to enforce which the law gives no remedy is actually performed, as where usurious interest has been paid, the money cannot be recovered. But the continuance of a promise, contrary in itself to law, cannot be enforced, however often the parties may change the evidence of it.

Rosenda v. Zabriskie, 493.

2. Where a contract stipulates for usurious interest, the creditor can only recover the principal debt. *Ib.*
3. Nothing in the charter of the Bank of the United States created by the State of Pennsylvania, prohibited it from making loans in Louisiana, at the highest rate of interest allowed by the laws of the latter State; and such loans are not usurious. *Frazier v. Willcox*, 517.

VERDICT.

Where in an action to recover possession of plans, books, &c., there is a verdict for the restoration of certain plans and books, and in default thereof, condemning the defendant to pay a fixed sum, a new trial must be allowed, that the verdict may determine what sum shall be paid on failure to deliver each particular plan or book.

Commercial Bank of New Orleans v. Stein, 189.

WARRANTY.

See SALE, 9, 10.

WILL.

See DONATIONS MORTIS CAUSA.

END OF VOLUME IV.

